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> [M]ore than any other constitutional decision of recent times, the *Abortion Cases* . . . rekindled the debate about the legitimacy of . . . noninterpretive [judicial] review.[1]

The latest phase of the debate on the legitimacy and scope of judicial review opened with a stunning critique of *Roe v. Wade*[2] by Professor (now Dean) Ely.[3] Ely blasted *Roe* as an illegitimate resurrection of the substantive due process doctrine of *Lochner v. New York*.[4] Indeed, he characterized *Roe* as even more dangerous than *Lochner*[5] and credited it with

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This article is the outgrowth of a larger work in progress, focusing on Justice Brandeis' contributions to the law, particularly the law of privacy. Portions of this article will be incorporated into the larger work. This project was initiated in a 1980 summer seminar in legal history sponsored by the National Endowment for the Humanities and directed by Professor Robert M. Cover of the Yale Law School. It was continued under an Open Faculty Fellowship granted in 1981 by Lilly Endowment, Inc., of Indianapolis, and during the author's sabbatical leave from Indiana University School of Law—Indianapolis in the fall of 1982. These and other grants for travel and expenses from the law school and the Indiana University Foundation were invaluable aids in the development of this project and the research that led to this article.

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1. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 144 (1982); *see also* Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143, 143 (1981) ("Had it ended with *Griswold v. Connecticut*, in 1965, the right to privacy might have gone largely without criticism.").

2. 410 U.S. 113 (1973).

3. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). The current debate is but a continuation of a debate that has been going on since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In the recent past, its participants have included Learned Hand, Herbert Wechsler, Charles Black, Alexander Bickel, and many more. *See generally* G. GUNTHER, CONSTITUTIONAL LAW CASES AND MATERIALS 22–25 (10th ed. 1980).

4. 198 U.S. 45 (1905).

5. Ely, *supra* note 3, at 940, 943. Justice Rehnquist's dissent in *Roe* also accuses the Court majority of resurrecting *Lochner*, *Roe*, 410 U.S. at 174, and Justice White's dissent calls the majority opinion "an exercise of raw judicial power," *id.* at 222.

There are other parallels between Ely's criticism and Rehnquist's dissent. Neither Ely nor Rehnquist sees any relationship between abortion and privacy. Ely, *supra* note 3, at 932 ("All of this . . . has

precipitating a reexamination of his own position in the ongoing controversy over the relative merits of "interpretive" and "noninterpretive" modes of judicial review.[6] The result of this soul-searching was a theory of judicial review that managed to justify virtually all of the reforms of the Warren Court *except* the right of privacy.[7] In Ely's terminology, interpretive review is confined to enforcement of "norms that are stated or clearly implicit in the written Constitution"; noninterpretive review enforces "norms that cannot be discovered within the four corners" of the Constitution.[8]

To the strict interpretivist, of course, the question is an easy one: neither privacy nor abortion is mentioned anywhere in the Constitution. The interpretivists did not need *Roe* to trigger their criticism of the constitutional right of privacy; it surfaced after the first privacy case, *Griswold v. Connecticut*.[9] But now, after *Roe*, even noninterpretivists and neo-interpretivists[10] are haunted by the ghost of *Lochner* and the spectre of Alexander Bickel's "counter-majoritarian difficulty."[11] Bickel himself attacked *Roe* as judicial legislation.[12] Professor Perry characterized it as "perhaps

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nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests."); Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting) ("I have difficulty in concluding . . . that the right of 'privacy' is involved in this case."). Both recognize that the right to decide whether to have an abortion may be part of the liberty protected by substantive due process, but neither can see any reason for giving this right special protection. Each would use the lenient rational basis standard, the same standard that has been applied to economic legislation since the Court's repudiation of *Lochner*, to test government action restricting the right.

6. *Roe*, Ely writes, "forced all of us who work in the area to think about which camp we fall into." J. ELY, DEMOCRACY AND DISTRUST 2–3 (1980).

7. Ely's theory, which elevates *Carolene Products* footnote four, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), to the status of an axiom, is discussed *infra* notes 182–206, 228–45, 255–75, and accompanying text.

8. J. ELY, *supra* note 6, at 1. Perry similarly defines noninterpretivist judicial review as "constitutional policymaking." M. PERRY, *supra* note 1, at 6. Brest uses somewhat different terminology to express a similar distinction between "originalism" and "nonoriginalism." He further subdivides originalism into "strict textualism" or literalism, "strict intentionalism," and "moderate originalism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204–05 (1980). For consistency, this article will use Ely's definitions in discussing judicial review.

9. 381 U.S. 479 (1965); *see id.* at 507 (Black, J., dissenting); R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 249–82 (1977) (discussing *Griswold* and substantive due process); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–11 (1971) (discussing *Griswold*).

10. Professor Alexander describes Ely's theory as "neo-interpretivism." Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 9–10 (1981).

11. A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

12. A. BICKEL, THE MORALITY OF CONSENT 27–28 (1975) (published posthumously):

> On January 22, 1973, the Supreme Court, paying formal tribute to Holmes's 1905 dissent [in *Lochner*] but violating its spirit, undertook to settle the abortion issue. In place of the various state abortion statutes in controversy and in flux, the Supreme Court prescribed a virtually uniform statute of its own.

Id. at 27.

the paradigmatic example of a court constitutionalizing nonconstitutional values."[13] Perry devised a "functional" theory of judicial review that would preserve noninterpretive review, including the right of privacy, but would subject it to the power of Congress to limit the jurisdiction of federal courts.[14] Professor (now Dean) Choper also would preserve the right of privacy, but he has offered no substantive theory to justify it.[15]

To be sure, there are those who see little substance in the debate and little point in attempting to distinguish interpretivism from noninterpretivism,[16] but the discussion continues unabated, and the stakes are high. Much more than a "right to abortion" is involved here. The values protected by the line of cases culminating in *Roe* are individual privacy and autonomy; these values are central to our society and increasingly threatened by modern technology.[17] Even though the dire prophecies of George Orwell's *Nineteen Eighty-Four* and Aldous Huxley's *Brave New World* have not been completely realized, we have come close enough to justify concern.[18] We do not yet have Orwell's omnipresent telescreen, but techniques of surveillance are proliferating, and the collection of personal data in computer

13. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 420 (1976); *see also* Lupu, *Constitutional Theory and The Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 583 (1983) ("*Roe* cut fundamental rights adjudication loose from the constitutional text.").

14. Perry would concede such power to Congress only in cases involving noninterpretive review. M. PERRY, *supra* note 1. Perry's theory is discussed *infra* notes 198–99, 207–14, 246–55, and accompanying text.

15. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Professor Choper's proposals are discussed *infra* notes 215–23, 276–77, and accompanying text.

16. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 566–67 (1978); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93 (1983); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Wellington, Book Review, 97 HARV. L. REV. 326 (1983) (reviewing J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982)).

17. "All the forces of the technological age [have operated to] narrow the area of privacy . . . ." Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965). *See generally* Peck, *Extending the Constitutional Right to Privacy in the New Technological Age*, 12 HOFSTRA L. REV. 893 (1984).

18. The loss of privacy was a key factor in these two fictional works. G. ORWELL, NINETEEN EIGHTY-FOUR (1948); A. HUXLEY, BRAVE NEW WORLD (1932). In the perpetual war of George Orwell's *Nineteen Eighty-Four*, constant surveillance and mind control led to a total loss of privacy. "[T]o do anything that suggested a taste for solitude . . . was always slightly dangerous." G. ORWELL, *supra*, at 81. The two-way telescreen followed every movement, and "[b]y a routine that was not even secret, all letters were opened in transit." *Id.* at 112. The perpetual peace of Aldous Huxley's *Brave New World*, where "everyone belong[ed] to every one else," A. HUXLEY, *supra*, at 26, reached the same end by a different route. The constant pursuit of mindless pleasure reduced everyone to no more than a "cell in the social body." *Id.* at 60. Not only was there a total loss of privacy, but constant conditioning had eradicated even the desire for privacy. In the reality of 1984, we found neither perpetual war nor perpetual peace, but rather perpetual non-war and non-peace. Government is neither as oppressive as it was in Orwell's vision, nor as paternalistic as it was in Huxley's, but it has some disturbing elements of both.

memory banks is mushrooming. The threat to privacy and autonomy is real enough to underline the need for protective measures to ensure that Orwell's vision of 1984 does not become the reality of 2004, or even 1994.

Legal and constitutional protections of privacy and autonomy have taken diverse forms that share common threads. The tort action for invasion of privacy, generally credited as originating with the Warren-Brandeis article, *The Right to Privacy*,[19] protects the individual from unwanted publicity and other intrusions upon his or her private life.[20] The fourth amendment protects against government intrusion into a person's home and private papers; the fifth amendment protects against forced elicitation of self-incriminating testimony.[21] More recently, the substantive due process right of privacy first enunciated in *Griswold*[22] has been applied to various forms of government intrusion into the privacies of life, from zoning laws[23] to marriage laws[24] to storage of information in computers.[25] But it is primarily the constitutional protection afforded the abortion decision,[26] that has precipitated the cry of Lochnerism and revitalized the interpretivist/noninterpretivist debate. In *Roe*, the right of privacy finally emerged from the *Griswold* penumbras and stood revealed as what in fact it had always been—a substantive due process concept.[27] The ghost of *Lochner* walked again![28]

This article poses the question whether *Lochner* can finally be laid to rest without repudiating all applications of substantive due process, particularly protection of privacy and autonomy. The answer to that question

19. 4 HARV. L. REV. 193 (1890). *See generally* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

20. Other tort actions, such as intentional infliction of emotional harm and trespass, also protect privacy interests.

21. U.S. CONST. amends. IV, V. A link between the tort concept of privacy and the protections of the fourth and fifth amendments is provided in the parallels between the Warren-Brandeis article and Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 471 (1928). *See infra* notes 296–303 and accompanying text.

22. 381 U.S. 479 (1965) (invalidating a statute prohibiting the use of contraceptives). Although Justice Douglas' opinion for the Court denies reliance on the due process clause, five concurring justices do acknowledge the substantive due process underpinnings of the constitutional right of privacy. *See infra* notes 91–95 and accompanying text.

23. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

24. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (decided under the fundamental rights branch of equal protection analysis). The fundamental right relied upon in *Zablocki* was the substantive due process right of privacy.

25. Whalen v. Roe, 429 U.S. 589 (1977).

26. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

27. Many recognized privacy as a substantive due process concept from the beginning. *See, e.g.*, Emerson, *supra* note 17; Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

Justice Douglas' penumbra rationale, which tended to obscure the substantive due process roots of the right of privacy, is discussed *infra* notes 71, 77–82, and accompanying text.

28. *See, e.g.*, Ely, *supra* note 3, at 937–43 (equating *Roe* with *Lochner*).

requires a closer look at *Lochner* itself, and then at *Griswold, Roe,* and a few of the cases in between. The answers suggested by Ely, Perry, Choper, and others will then be discussed. Finally, this article will examine the ideas and ideals of the man who first conceived the common law right of privacy, Justice Louis D. Brandeis.

To attempt to look at the problem through the eyes of Brandeis is not to suggest that Brandeis himself would have endorsed *Roe v. Wade* or any of the other specific applications of the right of privacy.[29] Indeed, it is more likely that he would not have agreed with the abortion decisions.[30] But his lifelong concern with the values of privacy and autonomy suggests that his thought may well provide a useful counterpoint to current efforts to purge all such values from constitutional adjudication, and may also provide some much-needed guidance in the current controversy over the role of the courts in protecting those values in our constitutional democracy.

I. THE RISE AND FALL OF *LOCHNER*

Lochner v. New York[31] struck down a New York statute that limited hours of work for bakers to ten per day or sixty per week. The Court held that the right to make a contract to purchase or sell labor was part of the liberty protected by the due process clause of the fourteenth amendment.[32] The *Lochner* majority did not expressly identify liberty of contract as a "fundamental" right, nor did it purport to apply anything more than the usual rational basis standard of review, which is not surprising since the present double standard of review had not yet been developed. The majority simply held the state's proffered health justification "unreasonable and entirely arbitrary,"[33] and the law itself "mere meddlesome interference with the

29. *See infra* notes 305–09 and accompanying text.

30. *See* Interview with Professor Paul A. Freund in Cambridge, Mass. (Sept. 18, 1981); Interview with Judge Henry J. Friendly in New York City (Dec. 16, 1981); *see also infra* note 305 and accompanying text.

31. 198 U.S. 45 (1905).

32. *Id.* at 53 (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897), the first case to announce special constitutional protection for liberty of contract).

33. *Id.* at 62. The state's claim that the statute was valid as a labor law was dismissed in a few words: "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker." *Id.* at 57. In rejecting the state's attempt to justify the statute as a health measure, the Court found that the trade of baker was "not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee." *Id.* at 59. The first Justice Harlan, joined in dissent by Justices White and Day, cited treatises, reports, and statistics supporting the state's health claims and concluded that it was "not the province of the Court to inquire" as to the wisdom of the legislation. *Id.* at 69. Justice Holmes dissented separately. His often-quoted dissent admonishes that the fourteenth amendment "does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75.

rights of the individual,"[34] language that today would be appropriate in a case applying the lowest level of scrutiny. What gave the test its bite was the *Lochner* Court's extremely narrow view of legitimate public purpose.[35] The net effect was the same as though the Court had held, in today's parlance, that liberty of contract was a fundamental right, to be restricted only in furtherance of the most compelling state interests. In effect, the Court applied strict scrutiny, a fact noted by Justice Holmes, whose dissent objected to the special protected status thus accorded liberty of contract.[36]

The effort to identify rights that were truly fundamental enough to deserve special protection began with the Holmes and Brandeis dissents in the early free speech cases.[37] By 1925, in *Gitlow v. New York*,[38] the Court was willing to "assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[39] The Holmes dissent, joined by Justice Brandeis, advocated a higher level of scrutiny, expressed in the "clear and present danger" test, for state statutes abridging free speech.[40] Translated into today's language,

34. *Id.* at 61.

35. *See* L. TRIBE, *supra* note 16, § 8-4, at 438 (noting that the "strict judicial assessment of legislative ends" was "striking" in the *Lochner* line of cases).

36. Justice Holmes' dissent argued that a state statute should not be struck down as unconstitutional "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe *fundamental principles* as they have been understood by the traditions of our people and our law." *Lochner*, 198 U.S. at 76 (emphasis added). Note that the Holmes dissent did not repudiate substantive due process. Rather, it conceded that there were some fundamental principles that might justify the Court in overriding legislative judgments, but maintained that liberty of contract was not among them.

Justice Holmes' early opposition to treating liberty of contract as a fundamental right was carried on in the twenties and thirties by Justices Brandeis, Stone, and Cardozo.

37. *E.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring in the result) (joined by Holmes, J.); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (joined by Brandeis, J.). Characterization of this effort as a quest for fundamental rights was clearly a response to the Court's identification of liberty of contract as such a right in *Lochner*. *See infra* note 43 and accompanying text.

38. 268 U.S. 652 (1925).

39. *Id.* at 666. Despite this stated assumption, the majority was willing to give the New York statute involved in *Gitlow* "every presumption . . . in favor of [its] validity." *Id.* at 668. In modern constitutional analysis, the strong presumption of constitutionality employed in *Gitlow* would be consistent with the lowest level of scrutiny, rather than the highest level usually employed in cases involving legislation restricting the fundamental right of freedom of speech. Abridgement of a fundamental right usually triggers a presumption of *un*constitutionality.

40. *Id.* at 672–73. The clear and present danger test was first enunciated in Holmes' opinion for the Court in Schenck v. United States, 249 U.S. 47 (1919). Holmes was willing to concede, in *Gitlow*, that perhaps the states should be allowed a "somewhat larger latitude of interpretation" of free speech under the fourteenth amendment than Congress was allowed under the first amendment. 268 U.S. at 672.

the test required a compelling state interest (clear and present danger) to justify abridgement of the fundamental right of freedom of speech.[41]

The modern fundamental rights/compelling state interest analysis was even more clearly foreshadowed in Brandeis' concurring opinion in *Whitney v. California*:

> The right of free speech, the right to teach and the right of assembly are, of course, *fundamental rights*. . . . These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is *required* in order to *protect the state from destruction or from serious injury,* political, economic or moral. . . . [T]he *necessity* which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a *clear and imminent danger of some substantive evil* which the state constitutionally may seek to prevent . . . .[42]

Here the elements of today's strict scrutiny analysis are explicitly set out: a statute abridging first amendment rights is justified only if necessary ("required") in order to further a compelling interest (here, preservation of the state from "clear and imminent danger" of "destruction or . . . serious injury"). The constitutional balance Brandeis advocated, heavily weighted in favor of first amendment rights, was his response to the *Lochner* line of cases.

Although he opposed special due process protection for liberty of contract, Brandeis was willing to use substantive due process to protect personal rights he deemed fundamental, including "Right to appeal, Right to education, Right to choice of profession, Right to locomotion," as well as freedom of speech.[43] Brandeis' "Right to education" and "Right to

41. The clear and present danger test has been widely criticized both for being too lenient and for being too strict. *See generally* G. GUNTHER, *supra* note 3. Some of that criticism is based on subsequent modifications of the test in, e.g., Dennis v. United States, 341 U.S. 494 (1951). *See* Torke, *Some Notes on the Proper Uses of the Clear and Present Danger Test,* 1978 B.Y.U. L. REV. 1, 32–33.

42. 274 U.S. 357, 373 (1927) (emphasis added). Brandeis' concurrence was originally written as a dissent in another case, Ruthenberg v. Michigan, 273 U.S. 782 (1927), which was mooted by the death of the defendant. The language of the *Ruthenberg* dissent was then incorporated into the *Whitney* concurrence. *See* Cover, *The Left, the Right and the First Amendment: 1918–1928,* 40 MD. L. REV. 349, 384 (1981) (discussing the evolution of substantive due process protection of freedom of speech in the dissents of Holmes and Brandeis in the 1920's).

43. Felix Frankfurter's notes of conversations with Brandeis, Brandeis Papers, Harvard Law School Library, Manuscript Division [hereinafter cited as Brandeis Harvard Papers], *quoted in* Cover, *supra* note 42, at 377 n.102. Cover places these conversations, preserved in then-Professor Frankfurter's notes, in the summer of 1923. In the quoted conversation, Brandeis indicated a willingness to abandon substantive due process altogether (presumably to put an end to the *Lochner* doctrine), but while it existed, he felt that it "must be applied . . . to things that are fundamental." *Id.* This willingness to confine the due process clause to protection of procedural rights only, Alexander Bickel

choice of profession" were implicated in two substantive due process cases decided during the 1920's, *Meyer v. Nebraska*[44] and *Pierce v. Society of Sisters*,[45] which are the most direct precedent for the right of privacy enunciated in *Griswold*.[46] Despite his opposition to *Lochner*, Brandeis voted with the majority in both *Meyer* and *Pierce*.[47]

The retreat from *Lochner* began in the 1930's.[48] In 1938, the Court formulated the present very lax rational basis standard of judicial review in *United States v. Carolene Products Co.*[49] Even without detailed legislative histories, in economic regulation cases "the existence of facts supporting

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has described as merely a "flirtation." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 28 (1970). The flirtation was abandoned in *Whitney*, when Brandeis, somewhat reluctantly, accepted a due process rationale for protection of free speech. 274 U.S. at 373 ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.").

Brandeis' "Right to locomotion" clearly envisioned the fundamental right now protected as the right to travel, or the right to move freely from state to state. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

44. 262 U.S. 390 (1923). Professor Cover places the Brandeis-Frankfurter conversation, *see supra* note 43, in 1923; therefore the specific reference would have been to *Meyer* and Bartels v. Iowa, 262 U.S. 404 (1923), decided at the same time. *See* Cover, *supra* note 42, at 378 n.102.

45. 268 U.S. 510 (1925).

46. In Professor Gunther's phrase, these cases represent "an aspect of the *Lochner* tradition that never wholly died." G. GUNTHER, *supra* note 3, at 571.

47. In *Meyer*, the Court invalidated a state law prohibiting the teaching of German in public schools. Over Justice Holmes' dissent, 262 U.S. at 403, the Court restated its broad view of the liberty protected by the due process clause:

> Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge, to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those *privileges* long recognized at common law as *essential to the orderly pursuit of happiness by free men.*

Id. at 399 (emphasis added). This passage is a restatement, with added emphasis on personal rights, of the Court's earlier definition of liberty in Allgeyer v. Louisiana, 165 U.S. 578 (1897):

> The "liberty" mentioned in [the fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Since *Allgeyer* involved the right to make an insurance contract, its emphasis on what *Meyer* summarizes as the right "to engage in any of the common occupations of life" is not surprising.

In *Pierce*, a unanimous Court held an Oregon law that required all children to attend public schools unconstitutional under the due process clause. The *Meyer* right "to marry, to establish a home and bring up children" was further amplified as the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534–35.

48. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

49. 304 U.S. 144 (1938) (upholding the constitutionality of a federal statute prohibiting interstate shipment of "filled milk").

the legislative judgment [was] to be presumed."[50] Legislation regulating commercial transactions was not to be invalidated "unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[51]

Having clothed economic legislation with so strong a presumption of constitutionality, Justice Stone recognized that he might be diluting the constitutional protection afforded individual rights. In the now-famous footnote four, he conceded that "[t]here may be narrower scope for operation of the presumption of constitutionality" when legislation (1) "appears on its face to be within a specific prohibition of the Constitution," or (2) "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or (3) discriminates against minorities, since "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[52] Thus the Court's dual standard of review was born.

Footnote four figures prominently in the current debate on judicial review, especially in Ely's theory, and so merits close examination. It sets out three categories of legislation that *may* need to be subjected to "more exacting judicial scrutiny" than the loose rational basis standard enunciated in the text.[53] The second and third categories are tied to the political processes; the first category is not.[54] There is no reference in footnote four to the noneconomic substantive due process rights recognized in *Meyer* and *Pierce,* but that does not mean that these rights were to be equated with economic rights. After all, the holding of *Carolene Products* is clearly limited to economic legislation. Nevertheless, footnote four has been read as drawing a definitive line between the specific exceptions it mentions, which alone warrant strict scrutiny, and all other legislation, including both economic regulation and legislation restricting the rights of family autonomy previously protected by substantive due process. This is where Ely's theory draws the line, but insofar as it relies on footnote four, Ely's theory puts more weight on Justice Stone's footnote than it should have to bear.

50. *Id.* at 152.

51. *Id.*

52. *Id.* at 152 n.4. As originally drafted, the footnote contained only the second and third categories; the first was added at the suggestion of Chief Justice Hughes. *See* Lusky, *Footnote Redux: A* Carolene Products *Reminiscence,* 82 COLUM. L. REV. 1093, 1096–1100 (1982).

53. *Carolene Products,* 304 U.S. at 152 n.4.

54. The first category refers to specific prohibitions of the Constitution, "such as" the Bill of Rights. *See id.* Under the second category, legislation restricting the political processes, there are citations to cases dealing with first amendment rights, such as dissemination of information and peaceable assembly, but this category is clearly not intended to be coextensive with the first.

Dictum in a footnote containing such phrases as "there may be" and "it is unnecessary to consider now" could scarcely be considered as drawing a final, definitive line between the polar extremes of rational basis review and strict scrutiny. Viewed in perspective, footnote four is only a cautionary note,[55] designed to prevent the Court's eagerness to repudiate *Lochner* from leading to total abdication of its vital function of safeguarding individual rights.

Had it not been for the Court's overly zealous rejection of *Lochner,* the line drawn in *Carolene Products* need never have been drawn at all. If, as Professor Henkin has suggested, the Court had simply excised the "laissez-faire excrescence" from substantive due process, it could have continued to "subject all accommodations of private right to public good to bona-fide balancing."[56] It could have continued to treat individual liberty as "primary" and required government to justify *any* restriction of it, "but the fact that a regulation contributes to economic and social advancement [would be] proof enough, for that is clearly a proper, and now indeed primary, purpose of government."[57] As it has turned out, however, the excessively lenient standard for economic legislation has had to be counterbalanced by a strict standard to protect noneconomic individual rights. This has led to a protracted and often bitter debate over which rights are sufficiently fundamental to deserve such stringent protection.[58] Much of the criticism of *Roe* revolves around the question whether the right to make the abortion

55. *See* Lusky, *supra* note 52, at 1098 (The footnote was offered "not as a settled theorem of government or Court-approved standard of judicial review, but as a starting point for debate."). Professor Brest refers to it as an "almost off-hand suggestion." Brest, *The Substance of Process,* 42 OHIO ST. L.J. 131, 132 (1981); *see also* Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture,* 56 N.Y.U. L. REV. 547, 580 n.122 (1981); Powell, Carolene Products *Revisited,* 82 COLUM. L. REV. 1087, 1090 (1982). As Chief Justice, Stone himself later cited footnote four for the proposition that "[t]here are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned." Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring). Despite these strong overtones of substantive due process, Stone's concurrence in *Skinner* ultimately relied on procedural due process—the failure to grant a hearing before sterilization. *Id.* at 544–45.

For an interesting discussion of the current relevance of footnote four, see Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

56. Henkin, *supra* note 27, at 1427–28.

57. *Id.* at 1427. Professor Henkin concedes that, in the privacy cases, it was perhaps "too difficult for most of the Justices candidly to rehabilitate substantive due process at one blow after decades of silence and obloquy and within the fearful memories of New Deal survivors." *Id.* at 1428; *see also* Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624, 664 (1980).

58. Professor Henkin's analysis would focus less on the fundamental nature of the right and more on the necessity for government interference with the right. *See* Henkin, *supra* note 27, at 1427–28.

In some areas, notably in equal protection analysis, the two-tiered structure has broken down, leading to a third intermediate standard, now used in sex discrimination and some other cases. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

decision is fundamental enough to deserve heightened judicial protection.[59] It is now much too late to undo the history that led to the formulation of the question in this way, but it is not too late to shift the emphasis in the balance of private right versus public good away from the fundamentalness of the right and toward the sufficiency of the state's justification for restricting it.[60]

Even after its summary rejection of substantive due process, the Court continued to give heightened protection to the substantive due process rights identified in *Meyer* and *Pierce,* although at times it resorted to the subterfuge of equal protection analysis. In *Skinner v. Oklahoma,*[61] the Court invoked a fundamental right to procreation to invalidate a statute that required sterilization of persons three times convicted of certain crimes. Justice Douglas' identification of that right had unmistakable roots in *Meyer*:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . Any experiment which the State conducts is to [the individual's] irreparable injury. He is forever deprived of a basic liberty.[62]

In *Skinner,* the fundamental nature of the right involved was used as justification for "strict scrutiny" of the classification of crimes in the statute under an equal protection analysis.[63] The Court was thus able to protect the substantive due process rights surrounding marriage and procreation without unduly disturbing the ghost of *Lochner,* so recently laid to rest.[64]

No plausible equal protection argument was available to Justice Douglas twenty years later when he wrote the opinion of the Court in *Griswold.*[65]

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59. Both Justice Rehnquist and Dean Ely concede that what they prefer to call the right to abortion is protected by the due process clause. What they do not concede is that it is "fundamental" enough to be accorded any more protection than economic legislation. *See supra* note 5 and accompanying text.

60. *See infra* text accompanying notes 317–52.

61. 316 U.S 535 (1942).

62. *Id.* at 541.

63. *Id.* The analysis used in *Skinner,* which gives close scrutiny to classifications burdening fundamental rights, was made more explicit in later equal protection cases involving the fundamental right to move freely from state to state. *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969).

64. Justice Douglas' 1942 opinion in *Skinner* followed his own opinion burying *Lochner* in Olsen v. Nebraska, 313 U.S. 236 (1941).

65. The facts of *Skinner* were easily adapted to equal protection analysis because the Oklahoma statute involved in that case classified the persons who would be subjected to sterilization on the basis of the crimes they had been convicted of committing. No similar classification scheme was contained in the Connecticut statute challenged in *Griswold.* Nor was male/female classification subject to more than minimum scrutiny when *Griswold* was decided. More recent efforts to develop an equal protection rationale for privacy cases have relied either on a substantive equal protection rationale different from

But during the years between *Skinner* and *Griswold*, he had been engaged in a running battle with the Court majority over its substantive due process approach to criminal procedure. The majority position was that only procedural guarantees that the Court found to be "of the very essence of a scheme of ordered liberty" were applicable against the states under the fourteenth amendment.[66] This "selective incorporation" approach was opposed by Justices Douglas and Black, who favored total incorporation of all Bill of Rights guarantees into the due process clause of the fourteenth amendment.[67] The incorporation debate was still raging when *Griswold* came before the Court, and the effects of the debate are reflected in the opinions in that case.

II. *GRISWOLD*—THE MANY FACES OF PRIVACY

> Although a number of more traditional doctrinal threads were at hand—indeed, that is *Griswold's* fascination—Justice Douglas chose to weave the opinion from gossamer of his own.[68]

The Justices who decided *Griswold* were still haunted by the spectre of *Lochner*. Both Black and Douglas had been appointed by Franklin Roosevelt for the avowed purpose of changing the course of decision on the Court, particularly its hostility toward New Deal economic legislation. Both had written opinions proclaiming the end of the *Lochner* era.[69] Obviously, neither wanted to be the instrument for reviving *Lochner* and the substantive due process analysis it epitomized. Justice Black refused to take part in

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the "classification burdening fundamental rights" analysis implicit in *Skinner*, *see, e.g.*, Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977), or on a sex discrimination rationale, *see, e.g.*, Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

66. Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (opinion of Cardozo, J.)).

67. *E.g.*, Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting). The "selective incorporation" approach adopted by the majority ultimately led to incorporation of most of the procedural guarantees of the Bill of Rights into the due process clause of the fourteenth amendment. The incorporation debate is discussed in, e.g., Henkin, *supra* note 27, at 1417–18.

68. Karst, *supra* note 57, at 653.

> Considering the tarnished reputation of substantive due process in the years before *Griswold* . . . , it is not surprising that Justice Douglas disclaimed reliance on it. . . . After so many years of heaping scorn on *Lochner v. New York*, the Court has not found it easy to admit that substantive due process has returned.

Id. at 664.

69. *E.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (opinion of Douglas, J.); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (opinion of Black, J.).

the enterprise at all and wrote a blistering dissent.[70] Justice Douglas wrote the opinion of the Court, using the penumbra rationale to avoid the stigma of *Lochner*.[71] Three other justices wrote concurring opinions,[72] leaving the *Griswold* rationale in fragmented confusion.

In *Griswold,* the Supreme Court considered the constitutionality of a Connecticut statute prohibiting the use of contraceptives.[73] It was the third time this statute had been before the Court. In two previous cases, the Court had failed to reach the merits on grounds of justiciability and standing.[74] In his dissent to one of these decisions, *Poe v. Ullman,*[75] Justice Douglas had frankly relied on the due process clause as an alternate ground for declaring the statute unconstitutional.[76] But by the time he wrote the opinion of the

70. Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting). Justice Stewart also wrote a dissent, *id.* at 527, and joined Justice Black's.

71. *Id.* at 481–82 ("Overtones of some arguments suggest that *Lochner v. State of New York* . . . should be our guide. But we decline that invitation . . . .").

72. Justices Goldberg, White, and Harlan wrote concurring opinions, discussed *infra* notes 85–111 and accompanying text.

73. Section 53-32 of the General Statutes of Connecticut (1938) provided:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Defendants, the executive director and medical director of Planned Parenthood League of Connecticut, were found guilty as accessories for giving medical advice to married persons. They were fined $100 each. *Griswold,* 381 U.S. at 481.

74. Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

75. 367 U.S. 497, 509 (1961) (Douglas, J., dissenting).

76. *Id.* at 515 ("I am also clear that this Connecticut law as applied to this married couple deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment."). Justice Douglas' preferred ground of decision was the first amendment right of the doctor "to advise his patients according to his best lights." *Id.* at 513. But he cited the substantive due process case, Meyer v. Nebraska, 262 U.S. 390 (1923), as recognizing the right "to marry, establish a home and bring up children," *id.* at 399, *quoted in Poe,* 367 U.S. at 517, and, while he maintained his incorporationist position that the due process clause of the fourteenth amendment "includes all of the first eight amendments," 367 U.S. at 516, he departed from Justice Black's absolutist position by conceding that the meaning of "liberty" in the due process clause is not "restricted and confined" to the rights enumerated in the Bill of Rights. *Id.*

In addition to *Meyer,* Justice Douglas' *Poe* dissent cited the "freedom to travel" case, Kent v. Dulles, 357 U.S. 116 (1958), and his own dissent in the captive audience case, Public Utils. Comm. v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting on privacy grounds). *Poe,* 367 U.S. at 516–17. Justice Douglas closed his discussion of the meaning of "liberty" with a statement that foreshadowed his penumbra opinion in *Griswold*: "'Liberty' is a conception that sometimes gains content from the *emanations of other specific guarantees* [citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)] or from experience with the requirements of a free society." *Id.* at 517 (emphasis added).

On the whole, the Douglas dissent in *Poe* is not incompatible with a substantive due process approach to the right of privacy. Toward the end of his discussion of privacy, he made this statement: "This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live." *Id.* at 521. Here he cited the Warren-Brandeis article on privacy, as well as Justice Murphy's dissent in Adamson v. California, 332 U.S. 46, 124 (1946) ("I am not prepared to say that the [due process clause] is entirely and necessarily limited by the Bill of Rights.").

Court in *Griswold* four years later, Justice Douglas' flirtation with substantive due process was over. He rehabilitated *Meyer* and *Pierce* as first amendment cases, although neither mentions the first amendment,[77] so that they could be used to support his penumbra rationale. Despite his earlier concession that due process liberty was not confined to the Bill of Rights, Justice Douglas now strained to find the right of privacy in the penumbra, if not the letter, of the Bill of Rights.[78] He wrote that the specific guarantees of the first, third, fourth, fifth, and ninth amendments "have penumbras, formed by emanations from those guarantees that help give them life and substance," and that these penumbras "create zones of privacy."[79] *Griswold,* he wrote, "concerns a relationship lying within" the zone of privacy and a law that "seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[80] The analysis ended with a passing reference to overbreadth and the spectre of police searching "the sacred precincts of marital bedrooms."[81] Justice Douglas never mentioned either liberty or due process, even though it is obvious that his penumbral right could be applied against a *state* statute only through the due process clause of the fourteenth amendment.[82]

77. Justice Harlan's *Poe* dissent concedes that *Meyer* and *Pierce* would probably have been decided "by reference to the concepts of freedom of expression and conscience" derived from the first amendment, if they had been decided at a later date. 367 U.S. at 544. It is a giant leap from this concession to Justice Douglas' treatment of these cases as though they actually had been decided under the first amendment:

> By [*Pierce*], the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By [*Meyer*], the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.

Griswold, 381 U.S. at 482.

78. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold,* 381 U.S. at 484.

"Justice Douglas's famous 'penumbras' and 'emanations' opinion drew upon the incorporation legacy, rather than a doctrine of 'naked' substantive due process, and tortured the Bill of Rights into yielding a protected zone of privacy that would not tolerate a law banning contraceptive use by married couples." Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981, 994 (1979).

79. *Griswold,* 381 U.S. at 484, 485.

80. *Id.* at 485.

81. *Id.* (citing NAACP v. Alabama, 377 U.S. 288 (1958)).

82. His *Poe* dissent makes it clear that Douglas was aware of, and even receptive to, this analysis, yet he disdained to make it explicit, probably in a studied effort to avoid the stigma of *Lochner.* He succeeded only in evading, not avoiding, substantive due process; it remained implicit in his penumbral rights rationale. Finding a right of privacy in the penumbras of the Bill of Rights would secure protection only against federal action. To secure protection against state action, the right must be somehow incorporated into the liberty protected by the due process clause of the fourteenth amendment.

Consistent with his incorporationist position, Douglas was arguing, in effect, that the penumbras, as well as the letter, of the Bill of Rights are incorporated into the due process clause of the fourteenth amendment. The pure substantive due process position espoused by Justice Harlan would hold that the

Justice Douglas modified the incorporationist position to hold that the meaning of "liberty" in the fourteenth amendment due process clause is limited to the rights enumerated in the Bill of Rights *and* the penumbras of those enumerated rights. If he hoped by this refinement to persuade the strict incorporationist, Justice Black, the effort did not bear fruit. To Justice Black, the *Griswold* decision was nothing more nor less than a revival of *Lochner*. *Meyer* and *Pierce* were equally discredited; the "natural law due process philosophy" of those decisions was the same as that of *Lochner*.[83] There was no room in Justice Black's philosophy for penumbras or other emanations; only the letter of the Bill of Rights could inform the Court's search for the meaning of liberty in the due process clause. Anything more would leave the members of the Court free to decide "what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."[84] Ultimately, the penumbra rationale succeeded only in fragmenting the Court and obscuring the constitutional derivation of the right of privacy.

Although a bare majority of the Court did join in the Douglas opinion, only Justice Clark was willing to rest solely on the penumbra rationale.[85] Justice Goldberg's concurring opinion endorsed a substantive due process rationale, though only briefly.[86] Most of his opinion is devoted to a discussion of the ninth amendment,[87] which has compounded the confusion caused by Douglas' penumbras. Despite Justice Goldberg's express

right of privacy is part of the liberty protected by the fourteenth amendment due process clause irrespective of its position as a "penumbral" right. But note that Justice Harlan's due process right of privacy is also derived from implications from some specific guarantees, especially the first, fourth, and fifth amendments. *See* Poe v. Ullman, 367 U.S. 497, 549–52 (1961) (Harlan, J., dissenting). The real distance between the two positions is therefore not nearly so great as the *Griswold* opinions suggest.

83. *Griswold*, 381 U.S. at 516 (Black, J., dissenting).

84. *Id.* at 512. Justice Harlan pointed out that the restrictions placed on the Justices' discretion by the strict incorporationist approach were "more hollow than real. 'Specific' provisions of the Constitution, no less than 'due process,' lend themselves as readily to 'personal' interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed 'tune with the times.'" *Id.* at 501 (Harlan, J., concurring). There is an "I told you so" ring to Justice Harlan's opinion, as he noted that the incorporation doctrine was being used here to "restrict" the protection accorded individual rights rather than to expand them (as had usually been the case in the ongoing debate in the criminal procedure cases). *Id.* at 500.

85. The other three justices who joined the Douglas opinion also approved the substantive due process rationale of Justice Goldberg's concurring opinion. *Id.* at 486 (Goldberg, J., concurring). Chief Justice Warren and Justice Brennan joined the Goldberg concurrence. Justices White and Harlan concurred in the judgment without joining the opinion of the Court.

86. *Id.* ("I do agree that the concept of liberty [in the fourteenth amendment] protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."). Justice Goldberg did not, however, accept the incorporationist view that all of the Bill of Rights guarantees are included in the due process clause of the fourteenth amendment. *Id.* He thus subscribed to the pure substantive due process approach endorsed by Justices Harlan and White.

87. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

disclaimer[88] and the clear import of the ninth amendment's language,[89] many who have difficulty in swallowing the penumbra rationale have persisted in attributing the right of privacy to the ninth amendment.[90] The ghost of *Lochner,* so effectively conjured up by Black's dissent, made many courts and commentators wary of placing the constitutional roots of the right of privacy where they clearly belong, in the due process clause of the fourteenth amendment. Nevertheless, a careful reading of all six *Griswold* opinions establishes that it *was* a substantive due process case.[91] The Goldberg opinion, however briefly, does commit the three justices who subscribed to it to a substantive due process analysis.[92] Justice White's concurrence is pure substantive due process,[93] as is Justice Harlan's,[94] yielding a majority of five endorsing this analysis.[95]

The ultimate exposition of substantive due process is found in the seventh opinion in *Griswold,* Justice Harlan's *Poe* dissent, which is incorporated by reference into his *Griswold* concurrence.[96] Justice Harlan identifies the

88. *Griswold,* 381 U.S. at 492 (Goldberg, J., concurring) (emphasis added):

> I do not take the position of my Brother Black . . . that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. *Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights* protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.

89. The language of the amendment, quoted *supra* note 87, indicates an intent to make it clear that the maxim *expressio unius est exclusio alterius* should not be applied to the Bill of Rights. *See* Estreicher, *supra* note 55, at 559. This is how Justice Goldberg read it, as indicated by the passage quoted *supra* note 88.

90. The district court opinion in *Roe v. Wade,* for example, had identified the ninth amendment as the source of the right of privacy. *Roe,* 410 U.S. at 153.

91. Many commentators recognized it as such. *See, e.g.,* Emerson, *supra* note 17; Henkin, *supra* note 27; Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten,* 64 MICH. L. REV. 235 (1965).

92. *See supra* note 86 and accompanying text.

93. *Griswold,* 381 U.S. at 502 (White, J., concurring).

94. *Id.* at 499 (Harlan, J., concurring).

95. Since the Douglas analysis was incomplete, *see supra* note 82 and accompanying text, it could even be argued that all save the two dissenters were effectively following a substantive due process approach. What distinguished Justices Douglas and Clark from the five justices advocating a pure substantive due process approach was their implicit belief that the right of privacy could exist only if found within the penumbra, if not the letter, of the Bill of Rights. The other five recognized no such limitation.

The *Goldberg* opinion also endorsed penumbras, and Justice Clark silently accepted the "opinion of the Court," so there were also five Justices who followed the Douglas rationale. *See* Kauper, *supra* note 91, at 249.

96. *Griswold,* 381 U.S. at 500 (incorporating Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting)). Although Justice Harlan was dissenting from the Court's dismissal of *Poe* on justiciability grounds, he discussed the merits because he thought the constitutional issues were "entangled with the Court's conclusion as to the nonjusticiability of these appeals." *Poe,* 367 U.S. at 524 (Harlan, J.,

constitutional violation as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[97] The individual's right of privacy is part of the liberty protected by the due process clause of the fourteenth amendment:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.[98]

Justice Harlan's broad concept of liberty could not be confined, as Justice Black would have it, to the precise guarantees of the Bill of Rights:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require

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dissenting).

Kauper calls Harlan's *Poe* dissent the "ablest and most persuasive" and the "best opinion that has been written on the constitutionality of the Connecticut statute." Kauper, *supra* note 91, at 242; *see also* P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 175 (1982) (referring to Harlan's *Poe* dissent as "an elegant example of constitutional ethical argument").

97. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting).

98. *Id.* at 542.

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."

Id. at 544 (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

particularly careful scrutiny of the state needs asserted to justify their abridgment.[99]

Broad as this language is, Justice Harlan's privacy concept is nevertheless a carefully limited one. If the Connecticut statute had been nothing more than an expression of the state's "moral judgment that all use of contraceptives is improper," he would not necessarily have questioned the state's judgment.[100] His notion of privacy would not disturb the existing laws expressing the state's moral judgments on marriage, divorce, homosexuality, abortion, euthanasia, or suicide.[101] In Harlan's view, the flaw of the Connecticut birth control statute lay rather with its choice of means: it allowed the state "to enquire into, prove and punish married people for the private use of their marital intimacy."[102] At first blush, this statement is barely distinguishable from Justice Douglas' reference to invading "the sacred precincts of marital bedrooms,"[103] but the subsequent discussion makes it clear that Justice Harlan's concern was not with the territorial integrity of the marital home, but with the privacies of the life within the home.[104] The invasion of privacy implicit in the Connecticut statute could

99. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting) (citations omitted).

> [I]t is the purposes of [the Bill of Rights] guarantees and not their text, the reasons for their statement by the Framers and not the statement itself . . . which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.

Id. at 544 (citations omitted).

100. *Id.* at 546–47:

> If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.

But note that Justice Harlan did *not* say that his decision would certainly have been to uphold such a statute. Dean Redlich hypothesizes that Justice Harlan might have voted with the majority in the abortion cases. *See* Redlich, *A Black-Harlan Dialogue on Due Process and Equal Protection Overheard in Heaven and Dedicated to Robert B. McKay*, 50 N.Y.U. L. REV. 20, 26 (1975). This is far from self-evident, but clearly his concept of substantive due process is the one that offers the strongest support for the Court's decision in *Roe*.

101. *Poe*, 367 U.S. at 546–47 (Harlan, J., dissenting).

102. *Id.* at 548.

> It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Id. at 553. Justice Harlan's protection of sexual autonomy was thus clearly limited to intimacy within marriage. *See* Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 279–80 (1977).

103. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

104. *Poe*, 367 U.S. at 551 (Harlan, J., dissenting) ("here we have not an intrusion into the home so much as on the life which characteristically has its place in the home").

It is Douglas' emphasis on territorial integrity that permits Ely to conclude that the constitutional flaw in the Connecticut statute was that it "would generate intolerably intrusive modes of data-gathering." *See infra* text accompanying notes 138–39. The territorial emphasis also avoids the charge of

have been accomplished "without any physical intrusion whatever into the home."[105] Yet it "would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police."[106] Justice Harlan found this constitutional principle of privacy, as Brandeis had before him, in the values underlying the Bill of Rights, particularly the fourth and fifth amendments.[107]

The strength of Justice Harlan's view as support for the constitutional right of privacy derives from the fact that he looked to underlying principles rather than to emanations—to the core of the Bill of Rights rather than to its penumbra.[108] Its principal weakness lies in the limitations he placed upon the right—the deference he would have given the state's moral judgments.[109] These limitations reflected Justice Harlan's essential conservatism, but the constitutional right of privacy he conceived was and is capable of much wider application. It may well be that the limitations Justice Harlan built into his concept of privacy contributed to the Court's reluctance to embrace it, although clearly Lochnerphobia played a larger

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Lochnerism, which was no doubt Douglas' reason for using it.

105. *Poe*, 367 U.S. at 549 (Harlan, J., dissenting). In elaborating on the sources of the constitutional right of privacy, Justice Harlan quoted a passage from Boyd v. United States, 116 U.S. 616, 630 (1886), that stated that the principles underlying the fourth and fourteenth amendments "apply to all invasions on the part of the government and its employes of the sanctity of a man's home and *the privacies of life.*" *Poe*, 367 U.S. at 550 (Harlan, J., dissenting) (emphasis added).

106. *Poe*, 367 U.S. at 551 (Harlan, J., dissenting). The physical invasion would come within the letter of the fourth amendment; the Connecticut statute violated its spirit—the principle underlying the fourth amendment, as well as the first and fifth amendments. "[A] principle, to be vital, must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910), *quoted in Poe*, 367 U.S. at 551 (Harlan, J., dissenting).

107. Justice Harlan's views can be traced directly to Justice Brandeis' dissent in the wiretapping case, Olmstead v. United States, 277 U.S. 438, 478 (1928), which Harlan quoted in *Poe:*

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual whatever the means employed, must be deemed a violation of the Fourth Amendment.

Poe, 367 U.S. at 550 (Harlan, J., dissenting).

108. *See* 38 COLO. L. REV. 267, 268 (1966). This is more than a semantic distinction. Justice Douglas' avoidance of the Brandeis-Harlan approach was deliberate, and it resulted in an opinion that gave little guidance as to the sources and the scope of the right of privacy. Identifying underlying values was too reminiscent of the *Lochner* brand of substantive due process, and it would have undermined Douglas' position in the incorporation debate. Harlan, on the other hand, had no fear of *Lochner;* he embraced substantive due process openly and used the Bill of Rights as a source of constitutional values, not as a substitute rationale. As a result, his opinion seems destined to outlast the penumbras.

109. *See supra* notes 100–01 and accompanying text.

role. But Justice Harlan's vision assumed new significance in 1973, when *Roe v. Wade*[110] was decided. By then the Court was ready to concede that privacy was a substantive due process right.[111]

III. *ROE v. WADE*—RIGHT TO ABORTION OR RIGHT TO PRIVACY?

> This *right of privacy,* whether it be *founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is,* or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[112]

In this one crucial sentence, the Court in *Roe v. Wade* finally acknowledged that the right of privacy enunciated in *Griswold* was a substantive due process right[113] and held that the right applied to the abortion decision. To those who had been beguiled by Justice Douglas' talk of penumbras[114] or misled by Justice Goldberg's discussion of the ninth amendment, this was an intolerable forward leap, or an intolerable leap backward to *Lochner.* Those who had accepted *Griswold* as articulating a right of personal privacy based upon the substantive due process right recognized by the Court since 1923[115] had no difficulty in seeing *Roe* as a rational application

110. 410 U.S. 113 (1973).

111. *Id.* at 153. The concession is a throwaway line in one crucial sentence of the opinion quoted *infra* text accompanying note 112.

"[S]ubsequent developments seem to have confirmed the White-Harlan view, and not the magical mystery tour of the zones of privacy, as the prevailing doctrine of *Griswold.*" Lupu, *supra* note 78, at 994.

112. *Roe,* 410 U.S. at 153 (emphasis added).

113. This fact is underscored in the concurring opinion of Justice Stewart, who had dissented in *Griswold.* He concurred in *Roe* on the express understanding that privacy was now admitted to be a substantive due process right. He explained the Court's prior evasiveness as follows:

> In 1963, this Court, in Ferguson v. Skrupa . . . purported to sound the death knell for the doctrine of substantive due process . . . .
>
> Barely two years later, in [*Griswold*], the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa,* the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. . . . [But] it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantially invaded the "liberty" that is protected by the Due Process Clause . . . . As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, *and I now accept it as such.*

Roe, 410 U.S. at 167–68 (Stewart, J., concurring) (emphasis added).

114. *E.g.,* Ely, *supra* note 3, at 937–43.

115. Meyer v. Nebraska, 262 U.S. 390 (1923).

of that right, amply supported, though not compelled, by both precedent and principle.[116]

The trouble with *Roe* is that the Court's opinion, like the multiple opinions in *Griswold,* tends to obscure rather than elucidate the analytical bases of the decision.[117] The Court spent considerably more time discussing the history of abortion[118] than it did explicating the constitutional bases of the right of privacy.[119] After a brief discussion of the privacy cases, it concluded that the right of privacy includes the abortion decision and is "fundamental."[120] The Court then had to balance the pregnant woman's privacy rights against "important state interests in regulation."[121] The state interests identified as legitimate are the interests in maternal health and in protecting prenatal life.[122] The state's interest in maternal health was

116. Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics,* 533 B.U.L. REV. 765, 777 (1973). In answering Ely's criticism of *Roe,* Heymann and Barzelay noted that whether *Roe* represents a "quantum jump" in constitutional doctrine, Ely, *supra* note 3, at 936 n.93, depends largely on "how a student of the Court's decisions reads the preceding decisions. Narrowing the decisions from *Meyer* through *Eisenstadt* certainly allows one to draw a 'quantum jump' conclusion." Heymann & Barzelay, *supra,* at 771 n.61; *see also* Gerety, *supra* note 102, at 273–74; Sedler, *supra* note 16, at 119 n.167; *infra* text accompanying notes 138–41.

117. *See, e.g.,* M. PERRY, *supra* note 1, at 144:

> The Court's decision in the *Abortion Cases* was, and remains, problematic in part—in major part, I think—because the Court failed to articulate anything like a rigorous argument in support of its bare assertion that, in the previability period of pregnancy, a woman's interest in terminating her pregnancy is weightier than government's interest in preventing the taking of fetal life.

See also Epstein, *Substantive Due Process by any Other Name: The Abortion Cases,* 1973 SUP. CT. REV. 159; Heymann & Barzelay, *supra* note 116, at 765.

118. *Roe,* 410 U.S. at 129–47.

119. *Id.* at 152–56. These four pages consist largely of strings of citations, joined by terse, conclusory text. A single paragraph listing some of the Court's decisions protecting privacy under the first, fourth, fifth, ninth, and fourteenth amendments ends with the statement that only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty" are included within the constitutional "guarantee of personal privacy." *Id.* at 152. The Court concludes that the right of privacy has "some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 152–53 (citations omitted).

120. *Id.* at 153, 155. The holding of the case is contained in the single sentence quoted *supra* text accompanying note 112: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. To justify its application of the right of privacy to abortion, the Court cited the detriment the state imposes on a pregnant woman when it denies her the choice of abortion. *Id.*

121. *Id.* at 154. Since the right of privacy is "fundamental," regulation of the abortion decision can be justified only by a "compelling state interest," and legislation "must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.

122. *Id.* at 155–56. The interests identified were derived from state and lower federal court decisions:

> Although the results are divided, most of these courts have agreed that the right of privacy . . . is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health,

quickly disposed of: abortion in the early stages of pregnancy is safer than childbirth, therefore the state has no genuine interest in maternal health that would be furthered by laws prohibiting or regulating abortion.[123] At the point when abortion becomes more dangerous than its alternative, childbirth, at "approximately the end of the first trimester," the state may regulate abortion "in ways that are reasonably related to [protection of] maternal health."[124]

The state's interest in protecting prenatal life required more extensive discussion. The state argued in *Roe* that a fetus is a "person" under the fourteenth amendment, whose "right to life" is protected under the due process clause.[125] The Court surveyed the contexts in which the word "person" is used in the Constitution and concluded that the fourteenth amendment was not intended to apply to the unborn.[126] But even as "potential human life," the fetus would be entitled to some protection by the state. The question is: at what point in time does the state's interest in protecting the fetus become compelling? The total prohibition of abortion under Texas law implicitly identified that point as the moment of conception.[127] The Court, surveying the positions taken by various religions, the medical profession, and the law of tort and property, concluded that "the unborn have never been recognized in the law as persons in the whole sense."[128] This suggests live birth as the relevant dividing line, but the Court instead chose an earlier point, viability.[129]

The Court did not explain its choice, but the reasons for it seem fairly clear. In the Court's balance, the fundamental privacy rights of the pregnant woman outweigh the state's interest in protecting fetal rights until the fetus has acquired the capacity for independent life. At this point, the state's

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medical standards, and prenatal life, become dominant.

Id. at 155.

123. *Id.* at 163.

124. *Id.* at 164. The Court's use of the word "approximately," in identifying the point where the state's interest in maternal health became compelling, assumed significance ten years after *Roe*, when improvements in medical techniques had pushed back the threshhold of state involvement. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). The majority adhered to the trimester approach, emphasizing its flexibility.

125. *Roe*, 410 U.S. at 156–57. The right to life argument, if sustained, would raise interesting state action problems, for it is against deprivation of life by the *state*, not the mother, that the due process clause affords protection. *See* Epstein, *supra* note 117, at 179–80. Nevertheless, a holding that a fetus is a "person" entitled to protection under the fourteenth amendment would enhance the state's duty to protect it, as *parens patriae*, even against its parent. It could even be argued that equal protection would require that abortion be treated as a form of homicide, or at least child abuse.

126. *Roe*, 410 U.S. at 157–58.

127. This was the position argued by the state of Texas. *Roe*, 410 U.S. at 159.

128. *Id.* at 162.

129. *Id.* at 164–65.

interest can no longer be distinguished from its general interest in preventing the taking of human life, and abortion becomes virtually indistinguishable from infanticide.[130] The state's interest then outweighs the pregnant woman's rights, so as to justify regulation or even prohibition of abortion, *except* when necessary to preserve the life or health of the mother.[131] Similarly, the state's health interest increases in weight throughout the pregnancy as the dangers of abortion increase, but at no point does the state's interest in maternal health alone justify total prohibition of abortion.[132]

The opinion implicitly conceptualizes fetal rights as growing over time in a manner that roughly parallels the physical development of the fetus. As the fetus grows, so does the likelihood of its achieving independent existence, until it reaches the point of viability. The law has traditionally considered the "acquisition of a capacity for independent existence" as significant in the acquisition of fetal rights.[133] In that respect, laws restricting abortion were logically inconsistent with other law.[134] The reason for the inconsistency is suggested by the underlying moral and religious dispute over the question of "when life begins."[135]

At one point, the Court seemed ready to acknowledge a first amendment basis for its decision: "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman . . . ."[136] Since "all this" refers back to the Court's earlier discussion of the views of various religions, as well as law and medicine, on the question

130. *See* Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 734 (1976).

131. This exception indicates that the Court is still giving fractionally greater weight to the mother's rights than to those of the viable fetus.

The added weight given to the mother's rights would be easier to justify if only her right to life were so weighted. King argues that the "interests of mother and viable fetus should be weighed equally," King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1683 (1979), because there is "no relevant difference between a viable fetus and a newborn." *Id.* at 1676; *cf.* Epstein, *supra* note 117, at 184.

132. The prohibition on state health regulation in the early stages of pregnancy arises from the fact that, when abortion is safer than childbirth, there is no rational relationship between state regulation and the interest in maternal health asserted to justify it. When abortion becomes more dangerous than childbirth, the state's paternalistic interest in protecting the pregnant woman from the health risks she chooses to take are never strong enough in themselves to override her freedom of choice.

133. King, *supra* note 131, at 1676. King points out that live birth formerly was "the point at which the capacity criterion was satisfied. Today viability precedes birth, and therefore birth is no longer the event most appropriately satisfying the capacity criterion." *Id.*

134. *See Roe*, 410 U.S. at 161: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except . . . when the rights are contingent upon live birth."

135. *Id.* at 159.

136. *Id.* at 162.

of when life begins, this statement suggests that abortion is a matter of conscience, protected by the first amendment. If so, it is arguable that "by adopting one theory of life" the state of Texas was violating the establishment clause, and that by enforcing that theory on all pregnant women, regardless of their own religious beliefs, the state was also violating the free exercise clause. A freedom of belief argument could also be derived from free speech guarantees of the first amendment, based on *West Virginia State Board of Education v. Barnette*.[137] But the Court never developed the point beyond that one sentence, choosing instead to rely entirely on the substantive due process right of privacy.

This is rational analysis, adequately supported by relevant legal precedent and responsive to the complex human problem it addresses. But because the analysis is not articulated with sufficient clarity, *Roe* is vulnerable to attack by anyone who is not prepared to accept *Meyer* and *Griswold* as valid applications of substantive due process. Thus Ely read *Griswold* as holding the Connecticut ban on the use of contraceptives unconstitutional because it "would generate intolerably intrusive modes of data-gathering,"[138] or as protecting activities within the home.[139] He read *Roe* as a right-to-abortion case, and so could find no rational connection between the two.[140] When the right of privacy is fragmented in this way, it becomes possible to attack any segment of the right as judicial legislation, unsupported by precedent. If, however, the earlier cases are read as recognizing "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," the application to the abortion decision becomes not merely defensible, but virtually inevitable.[141]

It is just this kind of fragmentation of the right of privacy that animates the dissents in *Roe*. In Justice White's view, the Court "simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with

137. 319 U.S. 624 (1943); *see infra* notes 165–71 and accompanying text.

138. Ely, *supra* note 3, at 930.

139. *Id.* at 930 n.73. Ely interpreted Justice Harlan's *Poe v. Ullman* dissent as "extending heightened protection to activities . . . customarily performed in the home," and found this basis inapplicable to abortion. *Id.* This territorial view of privacy might have been better supported by Stanley v. Georgia, 394 U.S. 557 (1969), but this rationale was expressly repudiated in Paris Adult Theatre v. Slaton, 413 U.S. 49, 66 n.13 (1973). In any case, there is no reason other than a general aversion to substantive due process to so limit the constitutional right of privacy.

140. Ely, *supra* note 3, at 922, 941.

141. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), *quoted in Roe*, 410 U.S. at 169–70 (Stewart, J., concurring). "From this language in *Eisenstadt* to the abortion decisions is neither so far-fetched nor so unwarranted a step as some commentators have suggested." Gerety, *supra* note 102, at 273.

sufficient substance to override most existing state abortion statutes."[142] As so characterized, *Roe* is clearly an "exercise of raw judicial power," and an "improvident and extravagant exercise of the power of judicial review."[143] Justice Rehnquist also characterized the right of privacy as a "right to abortion,"[144] thus effectively severing *Roe* from its roots in *Meyer* and *Griswold*.[145] His technique joins fragmentation with literalism. He assumes that constitutional "privacy" has the same meaning as "privacy" in the dictionary sense, involving notions of secrecy and seclusion,[146] then attacks the constitutional right because it does not fit the dictionary definition.[147] One may quarrel with the Court's choice of the word "privacy" to identify a right that has at least as much to do with personal autonomy as it does with secrecy or seclusion,[148] but it is disingenuous to criticize the right because the label is perceived as inappropriate.[149]

It is undoubtedly too late to rechristen the constitutional right with a name less laden with established meaning, even if that would satisfy the critics. The right of privacy by any other name would still offend those who

142. *Roe*, 410 U.S. at 221–22 (White, J., dissenting).

143. *Id.* at 222. Justice White then sought to trivialize the abortion decision; he accused the Court of valuing the "convenience of the pregnant mother" more than the life of the fetus. *Id.* This argument is discussed *infra* notes 156–57 and accompanying text.

It should be noted that Justice White does not attack substantive due process per se. Recall that he concurred in *Griswold*, employing a pure substantive due process analysis. *See supra* note 93 and accompanying text.

144. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting). Although Justice White does not use the term "right to abortion," his "new constitutional right for pregnant mothers," *id.* at 221 (White, J., dissenting), clearly means the same thing.

145. Nor, in Rehnquist's view, is the privacy involved in *Roe* "even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment. . . . which the Court has referred to as embodying a right to privacy." *Id.* at 172. Rehnquist insists on treating the various aspects of the constitutional right of privacy as isolated pinpricks, to borrow Justice Harlan's metaphor. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Recall that it was precisely the connection between fourth amendment privacy and the right of privacy involved in *Griswold* and *Roe* that Justice Harlan made in his *Poe* dissent by looking at the values underlying both. Justice Rehnquist's skepticism will not permit him to look beneath the surface of enumerated rights for underlying values; his argument therefore must deal only with externals.

146. *See, e.g.*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 677 (1971). Compare Gavison's definition of privacy as a complex of three elements, "secrecy, anonymity, and solitude." Her definition expressly excludes noninterference with decisions such as abortion, which she considers to be more properly categorized as questions of "liberty" rather than privacy. Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 433, 436–38 (1980). *But see* Gerety, *supra* note 102, at 236 (defining privacy as "an autonomy or control over the intimacies of personal identity").

147. *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) (an abortion is not "private" in the "ordinary usage of that word"). But surely any competent lawyer is aware that even words with accepted meanings in ordinary usage—the word "fraud" comes to mind, but there are others—take on more particularized meaning when used to embody legal concepts.

148. *See, e.g.*, Henkin, *supra* note 27.

149. Others have also criticized the privacy semantics. *See, e.g.*, M. PERRY, *supra* note 1.

object to applying it to the abortion decision. In any case, the label is not as inappropriate in the context of abortion as is has been made to appear. Justice Rehnquist's attack proceeds on the assumption that it is the abortion itself that is constitutionally protected—i.e., that *Roe* is a right-to-abortion case. But it is not the abortion itself, but the *decision whether* to have an abortion, that is shielded both from public view and from public interference.[150] That decision *is* private, even in the dictionary sense of secrecy and seclusion. The distinction between the right to abortion and the right to make the abortion decision is crucial to the definition and scope of the right. A right to abortion would protect the pregnant woman only if she decided to have an abortion. Protecting the decision also protects her right *not* to have an abortion.[151]

The term "privacy" is appropriate in this context because it identifies a common characteristic of the kinds of activities that are protected in its name. Activities relating to marriage, procreation, contraception, and family relationships all involve intimate aspects of the individual's personal life.[152] They are concerned with the individual's private, as opposed to public, life. It is in this area that government interference is most intrusive and least justified.[153] The more complex, the more urbanized our social and economic structure becomes, the more difficult it becomes to attain physical seclusion, the more the individuals within that structure need the emotional seclusion that is provided by keeping their private lives truly private. The constitutional right of privacy recognizes that need and protects it from intrusion by government. This is but a logical and necessary extension of the concept of liberty embodied in our Constitution.

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150. *See* Tribe, *The Supreme Court, 1972 Term—Forword: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1, 10–11 (1973); *cf.* Gerety, *supra* note 102, at 274 (referring to the decision "to have or forego" an abortion).

151. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (discussing compulsory contraception); Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and some Reflections on the Uncertain Limits of Reproductive Privacy),* 77 MICH. L. REV. 1688, 1704 (1979). If some future legislature, concerned with overpopulation, were to pass a compulsory abortion statute, the right-to-life argument would have to rely squarely on *Roe v. Wade,* and unless the state's interest in curbing population could be characterized as compelling, the argument would prevail. Such a case could not properly be characterized as the Court constructing a new "right-not-to-have-an-abortion." It would not even be an *extension* of *Roe,* but merely a valid application of the principle established by *Roe.*

152. These are the applications identified by the *Roe* majority. *Roe,* 410 U.S. at 152–53. Karst conceives the right protected as "the freedom of intimate association." Karst, *supra* note 57, at 625. Intimacy is also an integral feature of Gerety's definition. *See* Gerety, *supra* note 102, at 245, 273–74.

153. The lack of justification for government interference is an important factor in distinguishing modern privacy cases from the *Lochner* line. *See infra* notes 380–84 and accompanying text; *see also* Perry, *supra* note 130; *Developments in the Law: The Constitution and the Family,* 93 HARV. L. REV. 1156, 1198–1242 (1980) [hereinafter cited as *Developments*].

Nowhere is the need for protection from government interference greater than it is in the abortion decision. "A woman's decision to have or forego an abortion is perhaps more than any other she makes an intimate one, expressive of both her identity and her autonomy."[154] A pre-*Roe* abortion decision recognized the significance as well as the personal intimacy of the abortion decision:

> Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school . . . or the right to teach a foreign language . . . .[155]

Justice White, on the other hand, identifies the woman's interest as mere "convenience."[156] Since the substantive due process mode of analysis involves weighing the relative interests of the pregnant woman and the state in the abortion decision, trivializing the woman's interest skews the balance in the state's favor. So, when Justice White weighs the "convenience of the pregnant mother" against the state's interest in preserving fetal life,[157] the outcome of the balancing is virtually preordained.

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154. Gerety, *supra* note 102, at 274.

155. Abele v. Markle, 351 F. Supp. 224, 227 (D. Conn. 1972), *quoted in* Roe v. Wade, 410 U.S. 113, 170 (1973) (Stewart, J., concurring). In Karst's view, the abortion cases were concerned with "the power of women to choose their roles in a male-dominated society, a power which the pre-*Roe* antiabortion statutes severely restricted." Karst, *supra* note 65, at 58 n.325.

156. *Roe*, 410 U.S. at 222 (White, J., dissenting).

157. *Id.* Justice White recognizes, of course, that abortions may be sought for a variety of reasons, among them "convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc.," *id.* at 221, but this listing hardly acknowledges the seriousness of the decision. "Embarrassment" is not all that is involved in illegitimacy, especially if the woman is physically or emotionally immature, and "economics" hardly acknowledges the desperation of the welfare mother faced with another pregnancy that threatens to perpetuate her status as such. Pregnancy involves much more than nine months of a woman's life; it may radically alter the course of her entire life. The fact that some women, if given the right to make the decision to abort, may make it for insufficient or even trivial reasons, does not justify withholding the right to choose from all women. The right to decide necessarily includes the right to make the "wrong" decision. Only if abortion is the wrong choice in every conceivable circumstance would an absolute prohibition be justified.

Ely also trivializes, but he is more ambivalent than Justice White. On one hand, he equates a "woman's freedom to choose an abortion" with "anyone's freedom to do what he wants," and concludes that the abortion decision is entitled to no greater protection than any other decision. Ely, *supra* note 3, at 935. Elsewhere, however, he concedes that "[h]aving an unwanted child can go a long way toward ruining a woman's life," and that the child "may not fare so well either." *Id.* at 923 & n.26. What he will not concede is that the Court should have any power to do anything about it. *Id.* at 926 ("the Court has no business getting into that business"). It is the spectre of *Lochner* that he feels forecloses recognition of any such power in the Court. *Id.* at 937–43. What Ely ends up saying, in effect, is that the danger of Lochnerism is so great that ruining a few women's lives is not too great a price to pay to avoid it.

One must resist the temptation to point out that the sacrifice Ely is willing to make to *Lochner* is

If there is any doubt about the extent of the burden placed on some women by laws prohibiting abortion, the prevalence of illegal abortions prior to 1973 offers some clue.[158] It is highly unlikely that so many women would have been willing to risk pain, disability, and even death for trivial reasons.[159] But under pre-*Roe* abortion laws, a pregnant woman who was not physically, emotionally, or financially able to spend the next twenty years of her life caring for a child had only one realistic legal alternative: she could serve as breeding stock for the adoption market.[160] It is not surprising that many women chose instead to face the hazards of illegal abortion. This does not mean, of course, that abortion, legal or illegal, is ever the right choice morally. It indicates only that to many women, despite the hazards, it represented the least objectionable of several highly unsatisfactory alternatives.

If the enormity of the intrusion on the woman's liberty (privacy in this context seems too small a word) is to be weighed against the fetus' chance for life,[161] the balance must take account of the risks it faces both before and after birth. It is too seldom noted that the child's life, if it survives gestation and birth, is inextricably bound up with the life of the mother who feels incapable or unwilling, for whatever reason, to give it life and sustenance. The life of the unwanted child is usually far from happy.[162] Granting that the quality of anyone's life is no ground for terminating that life once it has

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one that could not conceivably be exacted from him, for by no means all of *Roe*'s critics are male. Indeed, there is some evidence that men tend to be more supportive of freedom of decision in abortion than females. *See* Uslander & Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and State: Changes and Stability After the* Roe *and* Doe *Decisions*, 77 MICH. L. REV. 1772, 1779 (1979).

158. The substantiality of the burdens of unwanted pregnancy "is shown graphically by the extent to which pregnant women would suffer personal risk and pain to obtain abortions prior to *Roe v. Wade*." Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U.L. REV. 978, 992 (1981). *See* J. CHOPER, *supra* note 15, at 119 (citing estimates that criminal abortions decreased as much as 70 percent after *Roe*).

159. "In substance, the secular case against a severely restrictive law rests upon evidence that the demand for abortions is so widespread and insistent that forcing the satisfaction of this demand into illicit channels results in financial victimization and death for thousands of women." Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 684 (1963).

160. *See* Glover, *Matters of Life and Death*, N.Y. REV. BOOKS, May 30, 1985, at 19 (referring to this alternative as "making surrogate motherhood compulsory").

161. This is the way the balancing is done by the *Roe* dissenters and most of the critics of the abortion decisions.

162. *See* McRae v. Califano, 491 F. Supp. 630, 677–78 (E.D.N.Y.) (reporting on various studies of unwanted children), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980); Ely, *supra* note 3, at 923 & n.26; *see also supra* note 157.

The effect of forced childbearing is particularly burdensome on the poor. *See* Beal v. Doe, 432 U.S. 438, 456–57 (1977) (Marshall, J., dissenting) ("I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means . . . a bare existence in utter misery for so many poor women and their children.").

begun,[163] any balance between the pregnant woman's interests and the state's interest in the potential life she carries in her womb must take account of reality.

The pregnant woman's side of the balance draws added weight from first amendment values implicated in the right of privacy. Abortion laws are morals legislation: the state makes a moral judgment, based on strong moral and religious beliefs held by substantial segments of the population, and enforces that judgment on all pregnant women, regardless of their individual moral and religious beliefs.[164] In this respect, abortion laws represent the same kind of enforcement of official belief that the Court condemned in *West Virginia State Board of Education v. Barnette*[165] and *Wooley v. Maynard*.[166] Other first amendment values are implicated as well, notably associational rights[167] and the free exercise and establishment

163. The advances in medical science that make possible prenatal detection of fetal abnormalities underscore the fact that it is far safer to permit the life-or-death decision to be made before birth, or before viability, while it is still possible to identify a dividing line between fetal life and other forms of human life. Once the child is born alive, or even once it is capable of surviving the ordeal of birth, no principled basis remains to distinguish it from other human beings—from the old, the sick, the handicapped, the helpless. However tenuous the distinction may be between previable and viable fetus, or between fetus and newborn infant, *see* Glover, *supra* note 160, at 19–23, there *is* a perceptible dividing line. Once the child is born alive, decisions whether to treat its infirmities (with no possibility of input from the child itself) are no longer rationally distinguishable from similar decisions concerning the aged or infirm. The real slippery slope begins at birth. Placing the dividing line for the abortion decision at viability rather than at birth simply creates an added zone of protection for prenatal life.

164. In the larger sense, of course, most legislation involves the enforcement of moral judgments, much of it religiously based (e.g., thou shalt not steal). The difference between such legislation and that referred to here as "morals legislation" lies in the degree of secular justification for it, in terms of social need, as well as the extent to which various religions and philosophies are in agreement. *See infra* note 168; *cf. infra* text accompanying notes 317–44. There is a wide divergence of views on abortion among the major religions in this country. *See* McRae v. Califano, 491 F. Supp. 630, 690–702 (E.D.N.Y.) (outlining the positions of various faiths on the abortion issue), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980); *cf.* M. PERRY, *supra* note 1, at 109 ("[A] right answer [to a political-moral question] frequently represents, in the United States, a point at which *a variety* of philosophical and religious systems of moral thought and belief converge.").

165. 319 U.S. 624 (1943) (compulsory flag salute).

166. 430 U.S. 705 (1977) (invalidating a state law that required auto license plates to bear the motto "Live Free or Die"); *see also Developments*, *supra* note 153, at 1209–10, 1214–16.

> [T]he Constitution strictly limits state power to impose on its citizens any *particular* view of what moral, religious, or ethical values are orthodox. Crucial decisions about childbearing and childrearing are thus allocated to the family in part because majoritarian control of this process would allow the state impermissibly to standardize its citizens.

Id. at 1215–16; *see also* L. TRIBE, *supra* note 16, § 15-6, at 902–03 (citing *Meyer* and *Pierce* as limiting "governmental power to homogenize the beliefs and attitudes of the populace").

> There is a significant difference between doing something because one believes it to be morally right and wanting others compelled by the law to do that same thing whether or not *they* believe it is morally right. In a traditionally and proudly pluralistic society, this is a distinction that matters.

Perry, *supra* note 130, at 727.

167. Professor Karst recasts the right of privacy in terms of "freedom of intimate association."

clauses,[168] but such values do not suffice in themselves to account for the autonomy aspects of the right of privacy.[169] Only the notion of liberty in the due process clause itself is broad enough to contain the full scope of the right of the individual to conduct her *private* life without undue interference from government.[170] First amendment rights give added support to that right, but they do not define it. Nevertheless, the importance of first amendment values to the concept of constitutional privacy makes one wish that the Court had developed this theme beyond that one enigmatic sentence: "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman."[171]

An argument can also be made under the equal protection clause.[172] Laws affecting reproductive autonomy profoundly affect the situation of women in society,[173] but the equal protection analysis currently employed by the Supreme Court in sex discrimination cases does not readily lend itself to such an argument. For one thing, it has been applied only to situations in which men and women are treated differently, though similarly situated;[174] in reproductive capacity and function, men and women

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Karst, *supra* note 57. Karst acknowledges close ties to the first amendment, but maintains that the substantive due process right "can stand on [its] own." *Id.* at 654.

168. *See supra* notes 136–37 and accompanying text. Professor Tribe at one time proposed a justification for *Roe* that relied heavily on first amendment values, including both associational rights and the establishment clause. Tribe, *supra* note 150. Other commentators have proposed similar justifications. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 407–10 (1963); Law, *supra* note 65, at 1026 n.249; Morgan, Roe v. Wade *and the Lessons of the Pre-*Roe *Case Law*, 77 MICH. L. REV. 1724, 1743–44 (1979); Comment, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. U.L. REV. 944 (1980). Tribe appears to have retreated from this position in more recent writings. *See* L. TRIBE, *supra* note 16, at 928; Law, *supra* note 65, at 1026 n.249 (1984).

Professor Henkin recognizes that "our laws can be followed back to roots in the Bible," but the "constitutional issue begins to stir when we deal with legislation reflecting our particular morality—when the religious origins are more apparent and persistent, when the law is not common to all civilized nations, when it has no clear utilitarian basis." Henkin, *supra*, at 408.

169. *But see* Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (identifying "autonomous self-determination" as the central value underlying the first amendment).

170. *See* Karst, *supra* note 57; *cf.* McRae v. Califano, 491 F. Supp. 630, 741–42 (E.D.N.Y.) (invalidating the Hyde Amendment on a rationale combining first amendment rights of conscience with fifth amendment liberty), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).

171. *Roe*, 410 U.S. at 162.

172. *See, e.g.*, Karst, *supra* note 65, at 53–59; Law, *supra* note 65.

173. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375, 375 (1985); Karst, *supra* note 65, at 58 (arguing that the abortion question is "a feminist issue . . . going to women's position in society in relation to men); *see also* Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 169 (1984) (stating that *Roe* "was defensible only because it helped to empower women in society by putting them on a more equal footing with men. Men don't have to be involuntary incubators, even for their own children.").

174. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981); Law, *supra* note 65.

clearly are not similarly situated. For another, the Court has explicitly held that discrimination on account of pregnancy is not sex discrimination.[175] And, although laws affecting pregnancy clearly have a disproportionate impact on women, the Court requires proof of discriminatory intent or purpose before such an impact will trigger heightened scrutiny.[176] Faced with these obstacles, the equal protection argument must fall back on broad substantive principles of equality, an area in which there are few, if any, relevant precedents.[177] Nevertheless, the fact that there is no conceivable instance in which the law could, or would, impose a comparable burden on males should count for something in the constitutional balance.[178]

In any case, equal protection analysis should not be resorted to simply as a device to avoid substantive due process, as it has been in the past.[179] The concept of due process liberty is the most appropriate repository for the rights of privacy and autonomy protected in *Griswold* and *Roe*. What is needed is for the Court to be more forthright in dealing with *Lochner*. Until it articulates a principled basis for distinguishing *Lochner* from the later substantive due process cases, the right of privacy will remain vulnerable to critics both on and off the Court.

IV. *ROE*—THE NONINTERPRETIVIST PARADIGM

> Had it ended with *Griswold v. Connecticut*, in 1965, the right to privacy might have gone largely without criticism.[180]

The abortion cases sparked the latest phase of the perennial debate over the legitimacy and scope of judicial review. *Roe v. Wade* has been called the

175. Geduldig v. Aiello, 417 U.S. 484 (1974). Although the Court's similar holding in a Title VII case, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), has been overruled by Congress, *Geduldig* would still apply to equal protection claims. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982).

176. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976) (racial impact). There is a certain irony in the requirement of intent or purpose in sex discrimination cases, for the Court has frequently struck down statutes because they were "the accidental byproduct of a traditional way of thinking about females," Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring), thus tacitly conceding that sex discrimination is often unconscious and thus at least arguably unintentional.

177. Professor Karst identifies the "substantive core" of the equal protection clause as the "principle of equal citizenship," which he finds implicated in, e.g., *Eisenstadt* and *Roe*. He views these cases as "woman's role" cases, involving "some of the most important aspects of a woman's independence, her control over her own destiny." Karst, *supra* note 57, at 57.

"The requirement that similarly situated individuals be treated the same does not exhaust the idea of equality. Equality is a substantive goal . . . ." Law, *supra* note 65, at 1009.

178. "[M]ost of us now see that if men could get pregnant the right to choose would have had a central place in the debate long ago." Glover, *supra* note 160, at 19; *see also* Tribe, *supra* note 173.

179. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942), discussed *supra* notes 61–64 and accompanying text.

180. Gerety, *supra* note 1, at 143.

paradigm of noninterpretivist review.[181] Ely characterizes it as "the clearest example of noninterpretivist 'reasoning' . . . in four decades."[182] Fearing a return to the unbridled judicial discretion that characterized the *Lochner* era, he has devised a theory of judicial review that justifies the egalitarian reforms of the Warren Court while rejecting all other forms of noninterpretivist review,[183] especially *Roe*. Indeed, Ely credits *Roe* with precipitating a resurgence of interpretivism.[184] *Roe*, he writes, "forced all of us who work in the area to think about which camp we fall into."[185]

Ely's aversion to *Roe* is, at least in part, a reaction to the "politically conservative" makeup of the Burger Court. "[O]bservers who might earlier have been content to let the justices enforce their own values (or their rendition of society's values) are now somewhat uneasy about doing so and are more likely to pursue an interpretivist line, casting their lot with the values of the framers."[186] Choper has characterized the "often harsh and apocalyptic criticism" of the Burger Court by "libertarian admirers of the Warren Court" as a "whose-ox-is-gored"

181. *See, e.g.*, Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 420 (1976) (characterizing *Roe* as "perhaps the paradigmatic example of a court constitutionalizing nonconstitutional values"); Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 583 (1983) ("*Roe* cut fundamental rights adjudication loose from the constitutional text.").

182. J. ELY, *supra* note 6, at 2.

183. By Ely's definition, noninterpretivist review is judicial review enforcing "norms that cannot be discovered within the four corners" of the Constitution. *Id.* at 1.

184. Ely defines interpretivism as judicial review confined to "enforcing norms that are stated or clearly implicit in the written Constitution." *Id.* at 1. Perry similarly defines noninterpretive judicial review as "constitutional policymaking." M. PERRY, *supra* note 1, at 6.

185. J. ELY, *supra* note 6, at 2–3.

186. *Id.* at 3.

This frankly pragmatic approach gives a flavor of gamesmanship to the current interpretivist/noninterpretivist debate, lending credence to Professor Tribe's early characterization of it as a "red herring." L. TRIBE, *supra* note 16, § 11-2, at 566; *see also* Miller, *Toward a Definition of "The Constitution,"* 8 U. DAYTON L. REV. 633, 701 (1983) (characterizing the controversy over the legitimacy of judicial review as "essentially incoherent and unresolvable"); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319, 319 (1983) (characterizing Ely's argument as "startlingly specious").

A strong flavor of gamesmanship also surfaces in Professor Perry's acknowledgment that his judicial review argument is based on a premise with which he does not necessarily agree. *See* Commentary, *Morning Session*, 56 N.Y.U. L. REV. 525, 529 (1981) [hereinafter cited as Commentary]:

> The problem is the legitimacy of constitutional policymaking by the judiciary. I take as a given the principle that such policymaking must be electorally accountable. I make no brief in support of the principle. Rather, it is a part of my strategy in developing a theory of judicial review. In this way, I can play the game the way those who take this principle seriously would have me play it and say that, even taking this principle seriously, I can construct a reasonable justification for constitutional policymaking by the judiciary. Now if I could not do that, I personally would be willing to examine the axiom.

In fact, Perry said that he does not consider the kind of review the Court has been exercising in human rights cases as "all that untethered." *Id.*

approach.[187] Ely himself professes agreement with *Roe's* result,[188] but he is prepared to sacrifice the result in order to curb feared excesses by the Burger Court.[189] He would not trust this Court to venture far beyond the constitutional text.

The root of the problem is Alexander Bickel's counter-majoritarian difficulty,[190] as amplified by Judge Bork—"the seeming anomaly of judicial supremacy in a democratic society."[191] In Bork's view, the anomaly is dissipated by our "Madisonian" model of government, which is majoritarian but contains a counter-majoritarian premise, "for it assumes there are some areas of life a majority should not control."[192] But this model imposes upon the Court strict requirements of decisionmaking based upon neutral principles,[193] a requirement that Bork expands far beyond the point fixed by Professor Wechsler.[194] Whereas Wechsler asked for the neutral *application* of principles,[195] Bork insists that such principles be neutral in their "definition" and "derivation" as well—i.e., that they be value-neutral principles.[196] Otherwise judges would be "imposing their own values upon the rest of us."[197] Both Ely and Perry implicitly accept this view. When Perry defines noninterpretive review as "constitutional policymaking,"[198] and Ely concludes that noninterpretive review is difficult to reconcile with democratic theory,[199] both join Bork in denying the Court's power to make any value choices not clearly attributable to the framers.

187. J. CHOPER, *supra* note 15, at 135. Choper points out that a similar role reversal between advocates of judicial restraint and judicial activism took place in the 1930's, after the rejection of Lochnerism. *Id.; cf.* L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 85–89 (1969).

188. Ely, *supra* note 3, at 926 & n.50.

189. *Id.* at 943–49. Choper's own assessment of the Burger Court's record in human rights cases is much less critical than Ely's. J. CHOPER, *supra* note 15, at 105; *see infra* notes 276–77 and accompanying text.

190. A. BICKEL, *supra* note 11, at 16.

191. Bork, *supra* note 9, at 2.

192. *Id.* at 2–3. "There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny." *Id.* at 3. Bork thus seems to accept the basic notion of individual rights against the state, but he would strictly limit such rights to those specifically enumerated in the Constitution.

193. *Id.* at 2–3.

194. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

195. "Wechsler . . . recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another." Bork, *supra* note 9, at 2.

196. *Id.* at 7; *see* Perry, *supra* note 130, at 712 n.108 ("Bork is not calling for principled decision making; he is demanding value-neutral decision making.").

197. Bork, *supra* note 9, at 7.

198. M. PERRY, *supra* note 1, at 6.

199. J. ELY, *supra* note 6, at 4–5.

Ely's modified interpretivism, appropriately labeled "neo-interpretivism,"[200] would confine the Court to values found in the text of the Constitution *except* when broader intervention is necessary to preserve the integrity of the political process. To minimize the counter-majoritarian difficulty, the Justices would be limited to a rather narrow reading of the text in search of values incorporated therein by the framers, aided and augmented only by *Carolene Products* footnote four. The due process clause would be confined to protection of fair procedures,[201] leaving *Lochner* and *Roe* "equally illegitimate."[202] In order to circumscribe the discretion of judges, to exorcise the ghost of *Lochner*, this view would strip the open-ended provisions of the Constitution bare of all values save majoritarianism. Only those values that could be identified with preserving the democratic process would justify the Court in moving beyond the constitutional text.

The irony of this is that Ely, at least partly out of distrust for the Burger Court,[203] has accepted the premises of moral skepticism advanced by that Court's most conservative member. In seeking to confine the Court to the constitutional text, except when a process-oriented justification exists for noninterpretivist review, Ely seems to accept Justice Rehnquist's position that "[b]eyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments."[204] Yet it should be noted that Justice Rehnquist's strict interpretivist views have not prevented him from reading his own values into the tenth amendment in such cases as *National League of Cities v. Usery*,[205] even though doing so required him to

200. Alexander, *supra* note 10, at 9–10.

201. *See* J. ELY, *supra* note 6, at 15–21.

202. Commentary, *supra* note 186, at 532 ("I don't think *Lochner* and *Roe* can be distinguished. It seems to me they are equally illegitimate uses of the Court's power.") Indeed, Ely views *Roe* as having even less claim to legitimacy than *Lochner*. *Cf.* Ely, *supra* note 3, at 940–943 (arguing that because *Roe* explicitly identifies the "right to an abortion" as "fundamental" it "may turn out to be the more dangerous precedent"). This argument, of course, is grounded in Ely's fragmented reading of *Roe* as enunciating a right to abortion, rather than a right of choice as part of the autonomy protected by the substantive due process right of privacy.

203. *See supra* note 189 and accompanying text.

204. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976). *See* M. PERRY, *supra* note 1, at 102–07 (discussing Justice Rehnquist's moral skepticism).

205. 426 U.S. 833 (1976) (recently overruled by Garcia v. San Antonio Met. Transit Auth., 105 S. Ct. 1005 (1985)). "No value judgment constitutionalized by the framers even plausibly required the result in *National League of Cities*." M. PERRY, *supra* note 1, at 48 (concluding that noninterpretive review alone could explain the result in *National League*).

In *National League*, Justice Rehnquist managed to revive, for a limited time and for a limited purpose, a view of the tenth amendment as a limitation on the federal commerce power that had been used as grounds for invalidating federal economic regulations during the *Lochner* era, but which had been rejected by the Court in United States v. Darby, 312 U.S. 100 (1941).

disregard, discard, or distort considerable precedent. At the very least, this should demonstrate the futility of attempting to remove all moral values from the Court's consideration. These values will creep in, no matter how objective the standards are made to appear, but the "risk of an occasional egregious error like *National League of Cities* is the price we pay for treating the Constitution as law."[206]

Perry's theory accepts, at least arguendo, the premise that noninterpretive review is constitutional policymaking, which "ought to be subject to control by persons accountable to the electorate."[207] But he argues that noninterpretive review is nonetheless functionally justified, at least in human rights cases, as the "institutionalization of prophecy,"[208] and rejects moral skepticism by conceding at least the possibility that there may be right answers to political-moral questions.[209] Nor does he believe that the fallibility of the Court—the possibility of false prophecy—is a sufficient reason to "reject the whole enterprise."[210] Instead, to ensure some measure of political control over noninterpretive review, he would concede that Congress has unlimited power to limit the jurisdiction of the federal courts in noninterpretive cases.[211] This would subject most modern decisions dealing with human rights to the rarely used and much disputed

206. Gibbons, *Keynote Address*, 56 N.Y.U. L. REV. 260, 268 (1981); *see also* M. PERRY, *supra* note 1, at 47–49 (characterizing *National League of Cities* as a noninterpretive opinion by the "staunchest and most articulate defender of interpretivism" on the Court).

207. M. PERRY, *supra* note 1, at 9. "[M]y strategy is not to reject the principle but, on the contrary, to accept it as a given and then to defend judicial review—in particular, constitutional policymaking—as not inconsistent with the principle." *Id.* at 10. It is Perry's use of the word "strategy" that suggests that his acceptance is for the sake of argument only. *See also supra* note 186.

208. M. PERRY, *supra* note 1, at 98.

> The basic function of [judicial review] is to deal with those political issues that are also fundamental moral problems in a way that is faithful to the notion of moral evolution (and, therefore, to our collective religious self-understanding)—not simply by invoking established moral conventions but by seizing such issues as opportunities for moral reevaluation and possible moral growth. That is the sense in which I mean that noninterpretive review in human rights cases represents the institutionalization of prophecy. Such review is an enterprise designed to enable the American polity to live out its commitment to an ever-deepening moral understanding and to political practices that harmonize with that understanding.

Id. at 101. Rephrased in secular terms, Perry sees noninterpretivist review in human rights cases as enabling us "to maintain a tolerable accommodation between, first, our democratic commitment and, second, the possibility that there may indeed be right answers—discoverable right answers—to fundamental political-moral problems." *Id.* at 102.

209. *Id.* at 102–07; *see supra* note 208.

210. *Id.* at 115–16. Judicial fallibility appears to be a motivating force behind Ely's theory. *See supra* notes 186–89 and accompanying text.

211. *Id.* at 128–33.

power of Congress to limit federal court jurisdiction,[212] even though Perry believes that such decisions constitute "the most important constitutional function of the Court."[213] Surely Perry concedes too much.[214]

Professor Choper is much less concerned with the counter-majoritarian difficulty than either Ely or Perry. He agrees that judicial review is "incompatible with a fundamental precept of American democracy—majority rule"—because the Court is not a politically responsible institution.[215] But our constitutional scheme is far from pure majoritarianism,[216] and in that scheme, the Supreme Court performs a vital function: protecting against "governmental infringement of individual liberties secured by the Constitution."[217] Furthermore, Choper argues, the Court is uniquely qualified to fulfill its assigned role as the "ultimate guardian of individual liberty":[218]

> Since, almost by definition, the processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism. The Court's aloofness from the political system and the Justices' lack of dependence for maintenance in office on the popularity of a particular ruling promise an objectivity that elected representatives are not—and should not be—as capable of achieving. And the more deliberative, contemplative quality of the judicial process further lends itself to dispassionate decisionmaking.[219]

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212. *See, e.g.*, Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

Because Perry defines interpretivism very narrowly, virtually all modern decisions dealing with individual rights, including first amendment rights, fall within his definition of "noninterpretivist" review. *See* Lupu, *supra* note 181, at 584, 601–02. Professor Gunther characterizes Perry's position as "very unusual." Gunther, *supra*, at 911 n.69.

213. M. PERRY, *supra* note 1, at 37.

214. *See, e.g.*, Lupu, *supra* note 181, at 548, 601–02. Perry's efforts might have been more productive if he had examined his "axiom" that judicial policymaking "must be electorally accountable." *See supra* note 186.

215. J. CHOPER, *supra* note 15, at 2.

216. *Id.* at 61 ("the Constitution consists of a mass of antimajoritarian imperatives"); *see also* Perry, *supra* note 130, at 712–13 ("Our [national] commitment [to majoritarianism] is not, and has never been, that clear. Moreover, it certainly has not been a commitment to a restrictive theory of the judicial function."); Powell, *Authority and Freedom in a Democratic Society: Constitution, Legislature, Courts*, 44 COLUM. L. REV. 473, 487 (1944).

217. J. CHOPER, *supra* note 15, at 64; *see also id.* at 59 ("[T]he essential role of judicial review in our society is to guard against certain constitutional transgressions which popular majorities specifically seek to impose.").

218. *Id.* at 67.

219. *Id.* at 68; *cf.* A. BICKEL, *supra* note 11, at 24–32.

In Choper's view, the Supreme Court performs its vital function well precisely because it is *not* majoritarian.[220]

It is not democratic theory that causes Choper's concern with the counter-majoritarian difficulty. It is rather that the Court's lack of a political base leaves it at the mercy of the political branches and dependent upon the "confidence, goodwill, and respect of the people as a whole."[221] Choper sees the real problem as the "ultimately fragile nature of the judiciary's ability to effectuate its rulings."[222] In order to conserve its limited reservoir of public acceptance, he would have the Court decline to review certain questions of federalism and separation of powers, confining itself to its primary function, protection of individual rights, including privacy.[223] Choper's proposal thus poses no threat to *Roe,* but neither does it purport to offer any substantive theory to justify constitutional protection of privacy. Perry also would leave *Roe* untouched, but would subject it to Congress' power to limit the Court's appellate jurisdiction.[224] Only Ely proposes a theory of noninterpretive review that would automatically invalidate many decisions already made, notably *Roe*. Indeed, the invalidation of *Roe* seems to be its primary goal.

It is highly unlikely, of course, that any of these proposals will actually be adopted by the Supreme Court. In this sense, it is true that these scholars have "talked mainly to each other."[225] Each of their proposals would require the Court to alter its course in a radical manner, discarding wholesale entire lines of decision, or whole areas of decision, in order to resolve a tension that is in fact built into our constitutional scheme. Even if the recommendations offered far greater promise of ameliorating the counter-majoritarian difficulty than they in fact do, following any of them would require a recklessness that, fortunately, the Court has rarely exhibited. It would mean "sabotaging the idea of continuity in constitutional law."[226]

220. "[T]he Supreme Court is the most effective guarantor of the interests of the unpopular and unrepresented precisely because it is the most politically isolated judicial body." J. CHOPER, *supra* note 15, at 69; *see also* M. PERRY, *supra* note 1, at 102; Perry, *supra* note 130, at 728–29.

221. J. CHOPER, *supra* note 15, at 138.

222. *Id.* at 140; *see also id.* at 146–61 (discussion of problems of public resistance).

223. Choper proposes that the Court (1) "abstain from deciding constitutional questions of national power versus states' rights" and (2) "abstain from deciding ultimate issues of constitutional authority between Congress and the President." *Id.* at 169. Unlike Perry, Choper does not believe that Congress' power to curtail the jurisdiction of the federal courts is, or should be, an effective majoritarian check on the court's counter-majoritarian power. *Id.* at 52–55. Choper believes that the Court should retain its power to "pass final constitutional judgment on questions concerning the permissible reach and circumscription of 'the judicial power.' " *Id.* at 382–83.

224. It is not totally clear whether this would effect a total overruling of *Roe,* since state courts are not subject to the Congressional power. *See* Lupu, *supra* note 181, at 609–18.

225. *Id.* at 579.

226. *Id.* at 606; *cf.* Shiffrin, *The First Amendment and Economic Regulation: Away from a General*

> This process of evolution in constitutional law—from text to authoritative, yet bounded, decisional gloss on the text—carries the legitimacy of time, repetition, professional respect, popular understanding, and continued testing in the adversary process. All these qualities enhance, though of course they do not perfect or insure, the legitimacy and public acceptability of constitutional law.[227]

On the surface, the renewed concern over majoritarianism does appear to have its own roots in constitutional jurisprudence. It seems a natural outgrowth of the Court's own concern for equal participation in the political process, demonstrated most dramatically in the apportionment cases.[228] Indeed, it is the preservation of the political participation values of the Warren Court, along with its deep aversion to "Lochnerism," which appears to motivate Ely. His theory is admirably designed to save the Warren Court's egalitarianism from the depredations of the Burger Court, while at the same time restricting the libertarian excursions of the Burger Court,[229] and it seeks to accomplish this by accepting the interpretivists' majoritarian concerns. This would be a real tour de force if Ely could pull it off, but no one should be surprised if the Burger Court remains unpersuaded.

In reality, however, using majoritarianism as a basis for limiting the scope of judicial review is far removed from the Warren Court's concern with participational values. It requires a value judgment the Warren Court never made: that majoritarianism is the dominant principle in our democratic government, overriding all other considerations, including individual rights. Ely seems willing to make that value judgment because he can justify all of the rights that he considers most important—including first amendment and equal protection rights—in terms of participational (majoritarian) values. But he never defends the value judgment; he simply

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Theory of the First Amendment, 78 NW. U.L. REV. 1212, 1235 (1983) (commenting on the approach to precedent of Bork and BeVier in developing a theory of the first amendment) ("[T]heir position is not merely a claim that a particular set of precedents is wrong. That would be unremarkable. Their position assaults the idea of precedent itself.").

227. Lupu, *supra* note 181, at 606; *see also id.* at 616 ("The concept of erasure—a rip in the seamless web—is destabilizing, anarchical, and wholly alien to the structure of [the Anglo-American] system [of law.]"). The Supreme Court itself "has never indicated that it recognized any distinction between interpretive and noninterpretive review . . . . Nor has the Court ever seen the need to discuss the legitimacy of its actions." Sedler, *supra* note 16, at 110.

228. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

229. Ely sees the Warren Court as a "*Carolene Products* Court," and the Burger Court as departing from that perspective in favor of an approach concerned with identifying and protecting "fundamental" values. Ely, *The Supreme Court, 1977 Term—Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 12 (1978). Similarly, Lupu sees the fourteenth amendment as embodying the ideals of liberty (due process) and equality (equal protection), and the Burger Court as moving away from the egalitarian concerns of the Warren Court towards greater concerns for libertarian values. Lupu, *supra* note 78, at 982–84.

announces it in conclusory terms: "[M]ajoritarian democracy is . . . the core of our entire system."[230] Once that pronouncement is made, he need speak only of process. But is majoritarianism really an end in itself, or only a means to an end? Are not the true ends of our system of government those described in the Bill of Rights and the Declaration of Independence—life, liberty, and the pursuit of happiness—and majoritarianism merely a means to those ends?[231]

> The Constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.[232]

Protection of individual rights against the majority cannot be left to the majoritarian political processes.[233] Therefore, our Constitution and Bill of Rights limit the power of government to restrict the liberty of the individual.

Ely is decidedly ambivalent about liberty. He dismisses the Declaration of Independence as a "brief,"[234] although it is not clear why that characterization requires that it be disregarded as a source of values. Elsewhere, however, Ely concedes that liberty is one of the central purposes of our constitutional system: "[O]ur Constitution has always been substantially

230. J. Ely, *supra* note 6, at 7.

Estreicher accuses Ely of employing the same methodology he condemns in *Lochner* and *Roe*—"inferring a preferred set of values from wholly open-ended provisions" of the Constitution. Estreicher, *supra* note 55, at 551; *see id.* at 565 ("Ely's 'participational values' themselves embody substantive choices"); *cf.* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 502–10 (1981) (discussing Ely's attempts to justify protection of freedom of speech in process terms); *see also* Brest, *supra* note 55, at 140 ("The representation-reinforcing enterprise is shot full of value choices . . . ."); Glennon, *Personal Autonomy in* Democracy and Distrust, 1 CONST. COM. 229, 229 (1984); Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167, 181 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067 (1980). Other substantive values buried in Ely's discussion of process are identified in Richards, *The Aims of Constitutional Theory*, 8 U. DAYTON L. REV. 723, 740 (1983) (utilitarianism), and Richards, *supra* note 186, at 330–31 (moral universalization or reciprocity).

231. *See, e.g.*, Benedict, *To Secure These Rights: Rights, Democracy and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69, 85 (1981) ("both representative democracy and judicial review developed as means to secure a greater end—protection of rights"); Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 577 (1958) ("The object of the men who established the American Constitution . . . was not omnicompetent popular government, but the freedom of man as an individual being within a free society whose policies are based ultimately upon his consenting will."); *cf.* Sedler, *supra* note 16, at 124 ("The overriding principle in the structure of constitutional governance . . . is not the principle of representative democracy, but the principle of limitation on governmental power.").

232. R. DWORKIN, TAKING RIGHTS SERIOUSLY 132–33 (1977).

233. *See id.* at 142 ("decisions about rights against the majority are not issues that in fairness ought to be left to the majority").

234. J. ELY, *supra* note 6, at 49.

concerned with preserving liberty. If it weren't, it would hardly be worth fighting for."[235] He insists, nevertheless, that the Constitution is concerned primarily with process, rather than "ideology."[236] But "ideology" is not what is meant when we speak of ends. What we mean are *ideals,* and if Ely were successful in stripping the Constitution bare of all ideals, it would indeed "hardly be worth fighting for." But of course Ely does not really want to excise all ideals from the Constitution. All he wants is to excise the word "liberty" from the due process clauses, or at least to confine it to freedom from physical restraint (i.e., to *procedural* matters).[237] Judges simply cannot be trusted to deal with broad concepts such as liberty. They might identify the "wrong" liberty, as they did in *Lochner,* and so frustrate the will of the majority. To guard against this danger, Ely is willing to deny any substantive content to fourteenth amendment liberty, as was Justice Black.

The interpretivist Justice Black could accept the total incorporation of the Bill of Rights into the due process clause because when substantive due process is used as a conduit for applying the first amendment, or other Bill of Rights provisions, to the states, the judges' discretion is limited, to some extent at least, by the terms of the amendment being applied.[238] But beyond incorporation, he thought the Court had no "broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the '[collective] conscience of our people.'"[239] Black's targets in this broadside were Cardozo's concept of ordered liberty,[240] Harlan's tradition,[241] and Frankfurter's consensus,[242] all subsumed under the heading "natural justice."[243] His prime target, of course, was *Lochner* and its

235. *Id.* at 100; *see also id.* at 93 ("the very point of all that had been wrought [in the Constitution] had been, in large measure, to preserve the liberties of individuals").

236. *Id.* at 101.

237. *See id.* at 14–21. Other constitutional ideals, such as the right to equal treatment embodied in the equal protection clause, can be fitted within his process-oriented theory. Even the thirteenth amendment, Ely says, "can be forced into a 'process' mold," but it (alone among the Reconstruction amendments) does embody a substantive value, rejection of human slavery. *Id.* at 98.

238. *But see, e.g.,* Wechsler, *supra* note 194, at 17 (suggesting that the specific constitutional provisions really are not all that specific).

239. Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting). Justice Black was not always consistent in his interpretivist position. *See* R. BERGER, *supra* note 9, at 262–64.

240. *See* Palko v. Connecticut, 302 U.S. 319 (1937).

241. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

242. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) ("the consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution").

243. Griswold v. Connecticut, 381 U.S. 479, 511 n.4 (1965) (Black, J., dissenting) ("A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages.").

In 1965, when this was written, Justice Black may already have been beating a dead horse (although Black may claim considerable credit for preventing its resurrection). The concept of natural law now has

"natural law due process philosophy,"[244] which he saw revived in *Griswold*. For Black, natural law meant judges deciding "what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary"[245]—in other words, judicial legislation, as in *Lochner*. Black's aversion to substantive due process has been accepted as the basic premise underlying the theories of both Ely and Perry.

Perry follows Justice Black's view when he defines noninterpretive review as "judicial policymaking."[246] The Court strikes down "a policy choice made by an electorally accountable branch of government—in *Roe*, for example, a state legislature—and supplant[s] it with a policy choice of its own."[247] Perry pronounces this undemocratic, based on a definition of democracy that is "primarily procedural, not substantive"—that is, a definition from which he has excised all values, "such as substantive equality, respect for human rights, concern for the general welfare, personal liberty or the rule of law."[248] To say that noninterpretive review is undemocratic in this limited sense is to say only that the Court is not electorally accountable. It is the values so carefully excised from the word "democracy" that make it, to borrow Ely's phrase, "worth fighting for."[249]

It is these values, particularly personal liberty, that Justice Harlan sought to express in his *Poe v. Ullman* dissent through his concept of a living tradition.[250] To Harlan, substantive due process represented "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[251] To him, this is not a process in which "judges have felt free to

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"all but disappeared in American discourse." J. ELY, *supra* note 6, at 52; *see* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 717 (1975) (discussing the similarities and differences between modern human rights decisions and natural law), *quoted infra* note 272.

244. *Griswold*, 381 U.S. at 515 (Black, J., dissenting).

245. *Id.* at 512.

246. M. PERRY, *supra* note 1, at 4.

247. *Id.* at 1.

248. *Id.* at 3 (quoting Barry, *Is Democracy Special?*, in PHILOSOPHY, POLITICS AND SOCIETY 155–56 (5th series) (P. Laslett & J. Fishkin eds. 1979)). To avoid suggesting such "vague substantive ideals," Perry uses the word "democracy" only sparingly, using instead "electorally accountable policymaking." *Id.* at 4. Ely also excises ideals from the Constitution, insisting that the Constitution's main concern is process, not "ideology." J. ELY, *supra* note 6, at 101.

249. J. ELY, *supra* note 6, at 100; *see also id.* at 93 ("the very point [of setting up a democratic structure was] to preserve the liberties of individuals").

250. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). It is also embodied in Brandeis' concept of a "right to be let alone," which Harlan builds upon. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

251. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). The idea of "balancing" expressed by Harlan was anathema to the interpretivist absolutist, Justice Black.

roam where unguided speculation might take them."[252] Each constitutional claim "must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."[253] This is a rational process, in which, as Dworkin says, "the judge tries to reach an accommodation between . . . precedents and a set of principles that might justify them and also justify further decisions that go beyond them."[254]

Perry questions whether, "*beyond rhetoric,* there even are any traditional or consensual values—'public values'—sufficiently determinate to be of use to the Court in resolving particular human rights conflicts."[255] Ely rejects both reason and tradition as sources of values.[256] Reason is rather a method than a source of values, so perhaps Ely is correct in calling it an "empty source," but he also argues that it is "flagrantly elitist and undemocratic."[257] Upper-middle-class judges are too likely to find upper-middle-class values, such as the privacy of the home or personal autonomy, fundamental, as opposed to "jobs, food, or housing."[258] But jobs, food, and housing represent entitlements from the state rather than rights against the state (i.e., limitations on the state's power to control individual choices).[259] Even if it were true that the poor are more concerned with such entitlements than with rights against the government, and even if the Court were wrong in its failure to recognize entitlements as constitutionally enforceable, this would not prove that the Court is also wrong with regard to the protection accorded human rights.[260] Whatever their priorities, the poor *do* have an interest in rights against the state, as well as in entitlements from the state. Right or wrong, it is the concept of rights against the state, rather than entitlements from the state, that is written into our Constitution and our tradition.[261]

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252. *Id.*

253. *Id.* at 544.

254. R. DWORKIN, *supra* note 232, at 161. This is what Dworkin describes as the "constructive" model of judicial decisionmaking (as opposed to the "natural" model, in which "[t]heories of justice . . . describe an objective moral reality.") *Id.* at 160. The constructive model "demands that we act on principle rather than on faith." *Id.* at 162. Dworkin considers the Warren-Brandeis privacy article the paradigmatic example of "argument in the constructive mode." *Id.* at 160.

255. M. PERRY, *supra* note 1, at 96. Although Perry ultimately rejects moral skepticism, *id.* at 102–07, he asserts that the question quoted in the text "increasingly is answered in the negative." *Id.* at 96.

256. J. ELY, *supra* note 6, at 56–63.

257. *Id.* at 59.

258. *Id.*

259. *Cf.* L. TRIBE, *supra* note 16, at 919–21.

260. *Cf. id.*, § 11.4, at 573–75. The concepts of liberty and equality embodied in the Constitution may be in tension at times, but they are hardly irreconcilable.

261. Thus the Bill of Rights contains prohibitions against government action, such as "Congress shall make no law . . . ," U.S. CONST. amend. I, rather than provisions mandating government

Ely's argument against tradition is not that there is no such thing, but rather that there are too many traditions from which to choose; thus tradition "can be invoked in support of almost any cause."[262] As an example, he cites two "conflicting traditions" with regard to racial discrimination: "the egalitarian one to which most official documents have paid lip service over the past century, and the quite different and malevolent one that in fact has characterized much official and unofficial practice over the same period (and certainly before)."[263] This example does not really describe two traditions at all—at least not if tradition refers to national ideals, the sense in which Harlan used it. What it describes is the dichotomy between idealistic theory and official practice,[264] and the fact that we often have had difficulty in living up to our ideals hardly justifies giving up the effort:[265]

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action. "The Constitution tells government not what it must do, but what it must not do. The Framers saw the purposes of government as being to police and safeguard, not to feed and clothe and house." Henkin, *Constitutional Rights and Human Rights*, 13 HARV. C.R.-C.L. L. REV. 593, 618 (1978). Although the argument that the Constitution should be read as mandating some entitlements is not untenable, it hardly requires rejection of the concept of individual rights against the state.

262. J. ELY, *supra* note 6, at 60.

263. *Id.* at 61.

One is tempted to answer Ely's statement with a question: Can there be any doubt as to which tradition is the relevant one? See Alexander Bickel's answer *infra* text accompanying note 266. But Professor Berger seems to say, in his extended discussion of "Negrophobia" in the post-civil war period, that, in fact, it is the "malevolent" tradition that is relevant. *See* R. BERGER, *supra* note 9, at 10–19. In Berger's view, "The key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents rather than by abolitionist ideology." *Id.* at 10. Is one to conclude from this that the fourteenth amendment must forever be given a racist interpretation?

Perry expresses a thought similar to Ely's:

> The fact of the matter, our idealized Fourth of July oratory to the contrary notwithstanding, is that the so-called American tradition, to the extent it is determinate or concrete at all, is severely fragmented; there are several American traditions, and they include denial of freedom of expression, racial intolerance, and religious bigotry.

M. PERRY, *supra* note 1, at 93. The point is that, to the extent that "Fourth of July oratory" represents America's idealization of itself and its goals, the effort should be directed toward making its institutions and its law conform to those ideals and goals. We should not allow ourselves the luxury of speaking out of both sides of our mouths.

264. *Cf.* R. COVER, JUSTICE ACCUSED 20–22 (1975) (discussing the disparity between revolutionary rhetoric and the institution of slavery in the revolutionary period). Cover points out that, in the revolutionary period, many "were aware that the plea for independence sounded hollow in the mouths of slaveholders." *Id.* at 21.

The concept that "all men are created equal" represented an ideal that was far from realization in 1776. Even when the concept was particularized in the 13th, 14th, and 15th amendments, it was still many years before it was to be effectively implemented, and indeed the ideal still is not fully realized today. But the fact that the existence of slavery and the general level of society in 1776 mocked the expression of that ideal in the Declaration of Independence does not detract from its validity as an ideal, or require that it be interpreted today as limited by the inadequacies of the society that existed in 1776.

265. *Cf.* Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335, 381 (1981) ("It seems to me that we have begun to confuse the intractability and

> We are guided in our search of the past by our own aspirations and evolving principles, which were in part formed by that very past. When we find in history, immanent or expressed, principles that we can adopt or adapt, or ideals and aspirations that speak with contemporary relevance, we find at the same time evidence of inconsistent conduct. But we reason from the former, not from the frailties of men who, like ourselves, did not always live up to all they professed or aspired to. Lincoln reasoned, not from the Framers' resignation to the fact of slavery, but from the abolition of the slave trade and from the numerous manumissions, particularly in Virginia. In considering the Bill of Rights, we find worthy of note the stirrings of libertarian theory in colonial times, not the barbaric prosecutions.[266]

Aspirations and principles, not prejudices, are the traditions that we must look to. The Court's task is no less than to "translate into concrete form our deepest, most abstract public values."[267]

Ely asks us to reject what is best in our national heritage. He urges upon us a valueless jurisprudence, and valueless institutions, Professor Bickel reminded us, are "shameful and shameless."[268] Bickel's Constitution recognized "that principles are necessary, have evolved, and should continue to evolve in the light of history and changing circumstances."[269] What we are being asked to give up, as insurance against a resurgence of Lochnerism, is the whole concept of a Constitution that protects individual rights against the government, a concept that has animated our best legal minds and captured the imagination of other peoples as well as our own.[270]

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elusiveness of moral judgments with the very possibility and desirability of making them.").

266. A. BICKEL, *supra* note 11, at 109–10.

267. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 799 (1983).

To the "skeptical observation by Robert Bork," which Perry leaves unanswered—"What kind of 'fundamental presupposition of our society' is it that cannot command a legislative majority?"—the answer is: almost any one that might antagonize a sizeable group of organized and vocal electors. *See* M. PERRY, *supra* note 1, at 93–94 (quoting Bork, *The Legacy of Alexander M. Bickel*, YALE L. REP. 6, 9 (Fall 1979)).

268. A. BICKEL, *supra* note 12, at 24 ("A valueless politics and valueless institutions are shameful and shameless and, what is more, man's nature is such that he finds them, and life with and under them, insupportable.").

269. *Id.* at 25. Ultimately, Bickel found the highest values, as Ely later did, in the "constitution of structure and process." *Id.* at 29. "[T]he contractarian liberal is a moralist, and the moralist will find it difficult to sacrifice his aims in favor of structure and process, to sacrifice substance for form. Yet process and form, which is the embodiment of process, are the essence of the theory and practice of constitutionalism." *Id.* at 30; *see also id.* at 123 ("the highest morality almost always is the morality of process").

Bickel's resort to the "constitution of structure and process" follows discussion of *Roe v. Wade*, in which he accused the court of "refus[ing] the discipline to which its function is properly subject," i.e., of failing to explain the reasoning behind its decision. *Id.* at 27–28. Thus with Bickel, as with Ely, the flight to process was inspired by *Roe*.

270. The American concept of rights against government was a "major inspiration and model" for the creation of international human rights. "As a result, most of the Universal Declaration of Human

It is a concept that found elegant expression in Brandeis' *Olmstead* dissent:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[271]

Whether or not Brandeis' vision truly reflected the vision of the framers,[272] it does reflect our best vision of ourselves and our system of government.[273]

Perhaps if all judges were Brandeises, or Holmeses, or Cardozos, Ely would be willing to risk allowing them to deal with volatile concepts such as liberty. But we may as well recognize that great judges are a rarity—in the past two hundred years only a handful have emerged. We must take our chances with the unexceptional variety that our political processes ordinarily provide. We must risk that in the future, as in the past, "[t]he Court may mistake what is fundamental and enduring, as we now think it mistook the importance of 'liberty of contract,' but where it errs, its judgments will surely yield, as they yielded in that instance, to the slow pressures of unfolding history."[274] No constitutional theory can be devised that can safeguard us completely from judicial error, so it is futile to withhold discretion from judges on the chance they might misuse it. It is better to have a "constitutional jurisprudence that assumes and demands [the judges'] best than one that expects their worst."[275]

Rights and the International Covenant on Civil and Political Rights is, in essence, American constitutional rights projected around the world." Henkin, *supra* note 261, at 609.

271. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

272. *Cf.* A. BICKEL, *supra* note 11, at 99–100 (discussing a similar attribution of intent to the framers in Brandeis' *Whitney* concurrence).

> The intellectual framework against which these rights [the right to vote, the right of privacy, etc.] have developed is different from the natural-rights tradition of the founding fathers—its rhetorical reference points are the Anglo-American tradition and basic American ideals, rather than human nature, the social contract, or the rights of man. But it is the modern offspring, in a direct and traceable line of legitimate descent, of the natural-rights tradition that is so deeply embedded in our constitutional origins.

Grey, *supra* note 243, at 717.

273. Perry seeks to capture this self-vision in his concept of prophecy, our "religious self-understanding." M. PERRY, *supra* note 1, at 97–99.

> With nations, as with individuals, one of the tests of maturity is how closely one's self-perception squares with reality, or with the way one is perceived by others. Unless we are prepared to reject the ideals embodied in Brandeis' vision and alter our self-image to fit reality, we must find some way of squaring reality with our self-image—i.e., we must at least continue the attempt to live up to our ideals.

274. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 220–21 (1971).

275. Lupu, *supra* note 78, at 1054.

By Choper's gentler assessment, the Burger Court has not been wholly regressive in its handling of human rights issues.[276] Despite some retrenchments, its record falls far short of total surrender.[277] Future ideologically motivated appointments may change this, but whatever hazards the future may hold, they are unlikely to arise from the Court's protection of personal privacy and autonomy.[278] The similarities between *Lochner* and *Roe* have been exaggerated, at least in part because of the way the Court itself has characterized its decisionmaking process as a search for fundamental values entitled to special protection under the Constitution. This characterization was adopted largely to avoid acknowledging that what the Court has really been doing is balancing, because balancing was misused in *Lochner*. But describing itself as choosing fundamental values invites the kind of criticism that has been heaped upon the Court. It is easy to argue that value choices are for legislatures. Furthermore, identifying certain constitutional values as fundamental—even if the process is less arbitrary than the critics charge—hardly suffices to describe a decisionmaking process that in reality is, or should be, far more complex. It is only by looking at the entire process—at both sides of the balance, in their different factual contexts—that we can hope to find the relevant differences between *Roe* and *Lochner*.

No member of the Court has appreciated the significance of factual contexts more than Justice Brandeis. Recall that long ago he advocated both protection of family autonomy and abolition of *Lochner*. It should prove useful to attempt, at least, to look at the problem through the eyes of Brandeis.[279]

V. THE LEGACY OF BRANDEIS

> Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in

276. J. CHOPER, *supra* note 15, at 105.

277. *Id.* at 104–05. Choper believes the Court's "most prominent advance" was its development of the right of privacy, *id.* at 107, a view that Ely is unlikely to share.

278. For one thing, the Court has shown little inclination to expand the constitutional right of privacy; indeed, there are signs of retrenchment in the abortion funding cases and elsewhere. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977). In Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), Justice O'Connor wrote a dissent joined by the two *Roe v. Wade* dissenters, White and Rehnquist, that urged substantial revision of the *Roe v. Wade* analysis to give more deference to state regulation of abortion.

279. Woodrow Wilson once said that a "talk with Brandeis always sweeps the cobwebs out of one's mind." A. MASON, BRANDEIS, A FREE MAN'S LIFE 582 (1946).

> material things. Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people.[280]

Under Ely's definition, Brandeis' concept of a living Constitution would label him a noninterpretivist. Yet Brandeis is remembered, not as a judge who "felt free to roam where unguided speculation might take [him],"[281] but rather as an advocate of judicial self-restraint.[282] He was concerned that the justices not "erect our prejudices into legal principles,"[283] but this did not prevent him from speaking boldly for individual rights against the state. It was clear to him that protecting the individual against state power did not pose the same threat to democracy as interfering with legislative solutions to social and economic problems; that, indeed, the greater threat would come from *not* protecting individual rights. His distinctive contribution to our law was that "with immense resourcefulness he found ways to build the ancient ideals we profess into the structure of twentieth-century America."[284]

The political ideals that have become stereotypes for most Americans retained for Brandeis "their original meaning and warmth,"[285] perhaps because he was born in this country to recent immigrants and grew up in an atmosphere of "what might be called primitive Americanism."[286] The failed revolutions of 1848, which precipitated his parents' departure from Bohemia, "represented a renewal on Continental soil of the equalitarian ideals of the American and French revolutions."[287] Transplanted back to

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280. A. BICKEL, *supra* note 11, at 107–08 (quoting a paragraph dropped from a Brandeis dissent at the request of Chief Justice Taft, who considered it "unnecessary" and "certain to be used to support views that I could not subscribe to").

281. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

282. The Brandeis concurrence in Ashwander v. TVA, 297 U.S. 288, 346–48 (1936), is a classic exposition of the principles of self-restraint that Brandeis felt should guide the Court. *See* Mendleson, *The Influence of James B. Thayer Upon The Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 78 (1978).

283. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

284. P. FREUND, ON LAW AND JUSTICE 145 (1968); *see also* Bryden, *Brandeis's Facts*, 1 CONST. COM. 281, 281–82 (1984):

> For reformist lawyers, Louis Brandeis remains the consummate professional—a unique blend of the almost incompatible qualities that we most admire: prodigiously industrious but "a free man"; fabulously learned about business as well as law; a righteous preacher with an engineer's grasp of minutia; fiercely hostile to the trusts, yet always constructive; a man who recast themes from classical liberalism—individual responsibility, the sense of craftsmanship, village democracy—into a vision of industrial America that even now seems both daring and conservative. He has acquired some of the patina of an ancient statesman, yet many of his problems—from privacy to freedom of speech to unemployment—are our problems, and many of his answers still inspire. He was a founding father of the twentieth-century Constitution.

285. M. LERNER, IDEAS ARE WEAPONS: THE HISTORY AND USES OF IDEAS 99 (1940).

286. *Id.* at 73.

287. *Id.* Lerner describes the 1848 revolutions, "aptly characterized by Trevelyan as 'the turning-

American soil, these ideals "imparted a new freshness and vigor to the American tradition of civil and political liberties."[288] This background gave Brandeis a strong sense of individualism, later tempered by an equally strong sense of social justice.[289]

Brandeis' understanding of our democracy went far beyond simple majoritarianism to the values underlying our democratic system of government. In a speech made shortly before he was elevated to the Supreme Court in 1916, he said that democracy "insists that the full development of each individual is not only a right, but a duty to society; and that our best hope for civilization lies not in uniformity, but in wise differentiation."[290] But the equal right of all individuals to development required a limitation: "Each man may develop himself so far, but only so far, as his doing so will not interfere with the exercise . . . of a like right by every other of our fellow-citizens."[291] Although Brandeis always insisted that he had "no general philosophy,"[292] his "limitation" has echoes of Mill's principle: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[293] To Brandeis, no less than to Mill, government power over the individual was limited by the individual's rights of autonomy, which he identified as the right of self-development.[294] Nevertheless, Brandeis was no nineteenth-century libertarian; his individualism was tempered by a profound understanding of the social changes wrought by the industrial revolution.[295]

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point at which modern history failed to turn' [as] in spirit constitutional, humanitarian, idealistic." *Id.*

288. *Id.* ("Freedom and justice and democracy as home-grown varieties had wilted a bit in the hot climate of American experience; but when similar doctrines were transplanted from Europe they became vigorous and even beautiful growths."); *see also* Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1090 (1931) ("His [Brandeis'] parents, natives of Prague, were members of a band of 'Pilgrims of '48'; the failure of revolution in Europe led them to emigrate to America. They brought with them democratic notions and grand pianos, hard sense in their heads and verses from the romantic poets upon their lips.").

289. M. LERNER, *supra* note 285, at 73–75.

290. J. DEHAAS, LOUIS D. BRANDEIS: A BIOGRAPHICAL SKETCH 221 (1929) (quoting Brandeis' address to a mass meeting held in New York on January 24, 1916, to arouse public interest in the Jewish Congress movement).

291. *Id.* at 220.

292. A. LIEF, THE BRANDEIS GUIDE TO THE MODERN WORLD 209 (1941) ("I have no general philosophy. All my life I have thought only in connection with the facts that came before me."); *see also, e.g.*, M. LERNER, *supra* note 285, at 71.

293. J. MILL, ON LIBERTY 68 (Pelican Books ed. New York 1980) (1st ed. 1859).

294. "The ideal is for the people to have as little need of government and the law as possible. We need government to give help, but it should be restricted to certain limits." A. LIEF, *supra* note 292, at 35 (reporting a conversation of the author with Brandeis, April 18, 1937).

295. *See* M. LERNER, *supra* note 285, at 102. Brandeis did not "cleave to the tradition that the whole duty of a Supreme Court justice was to maintain a decent ignorance of the world outside the

In light of Brandeis' concern for individual autonomy, it is not surprising that, when Warren and Brandeis wrote their famous article advocating recognition of a tort remedy for invasions of privacy, they extracted from common law sources a right of "inviolate personality,"[296] a right far broader and more basic than the remedy proposed.[297] The same basic right, the "general right of the individual to be let alone,"[298] was invoked in Brandeis' dissent in the wiretapping case, *Olmstead v. United States*,[299] in support of a constitutional right of privacy under the fourth amendment, which he described as "the most comprehensive of rights and the right most valued by civilized men."[300] The connection between the tort and constitutional rights was not lost on Justice Holmes, whose handwritten note on an early draft of Brandeis' *Olmstead* dissent commented: "I fear that your early . . . zeal for privacy carries you too far."[301] But the right to

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Court." *Id.* at 82. Indeed, Mill himself,

> though he supported laissez faire as a matter of policy, believed that market transactions fell outside the protection of his principle of liberty. As he said, "Trade is a social act. Whoever undertakes to sell any description of goods to the public does what affects the interests of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society."

T. GREY, THE LEGAL ENFORCEMENT OF MORALITY 20 (1983).

296. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

297. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 972–73 (1979) ("[B]asing their argument on the rights 'of an inviolate personality,' they spoke more broadly of the human need for 'some retreat from the world,' of the effect of unwarranted intrusion on a person's 'estimate of himself and upon his feelings,' and of the 'general right of the individual to be let alone.'"); *see also* Bloustein, *supra* note 19, at 976; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

298. Warren & Brandeis, *supra* note 296, at 205. The phrase, "right to be let alone," is from T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888); *see* McKay, *The Right of Privacy: Emanations and Imitations*, 64 MICH. L. REV. 259, 260 (1965).

299. 277 U.S. 438, 478 (1928). The connection between the privacy article and the *Olmstead* dissent is discussed in Freund, *Mr. Justice Brandeis*, in MR. JUSTICE 116–17 (A. Dunham & P. Kurland eds. 1956). *See also* Gerety, *supra* note 297, at 233 & n.3; Peck, *supra* note 17, at 901–02.

300. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) ("They [the 'makers of our Constitution'] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."). *See supra* note 297.

> The parallelism between the privacy article and the *Olmstead* dissent is so close as to suggest strongly that Brandeis believed, at the time he wrote his dissent, that the fourth amendment was intended to protect the very principle of "inviolate personality" which he had earlier suggested was the principle underlying the common law right to privacy.

Bloustein, *supra* note 19, at 976–77.

301. Brandeis Harvard Papers, *supra* note 43, at Box 48, file 5. In response to the draft sent to him on February 23, 1928, marked, "This is only for you," Holmes wrote:

> I think this is a [fine] discourse. I agree with the last point [illegal government activity].
>
> I still wobble on illegal search and regretfully but categorically disagree with the notion that the

be let alone expressed much more than a zeal for privacy in the dictionary sense of secrecy and seclusion.[302] It expressed Brandeis' fundamental conception of the blessings of liberty secured by our form of constitutional democracy: the right of the individual to self-development without undue interference either by other individuals or by government.[303] It was this broader view of privacy that the present Court implicitly adopted when it held the right of privacy to be broad enough to encompass a woman's decision whether or not to have a child.[304]

It is not at all clear that Brandeis himself would have approved application of his right of self-development to contraception and abortion, although he may have approved, in principle, the formulation of a constitutional right of privacy and autonomy.[305] He may also have approved

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use of the knowledge gained by wiretapping is contra Am. V.

I fear that your early [started] zeal for privacy carries you too far.

OWH

Id. In response to the final draft, "OWH" reiterated his agreement on "the last ground," but said he was "not quite ready to accept the Constitutional one." *Id.* Justice Stone, on the other hand, wrote, "I am with you on the Constitutional point . . . . I have some doubts about your second ground but will let you know." *Id.* at file 6.

Ultimately, with encouragement from Brandeis, *see* 2 HOLMES-POLLACK LETTERS 222 (Howe ed. 1941), Holmes wrote a separate dissent, relying on the nonconstitutional ground that "government ought not to use evidence obtained and only obtainable by a criminal act." *Olmstead,* 277 U.S. at 470 ("[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."). Stone concurred in both the Holmes and Brandeis dissents. *Id.* at 488.

302. *See supra* note 146.

303. *See supra* notes 290–91 and accompanying text. Professor Richards sees the arguments of the privacy article and the *Olmstead* dissent as expressing "the ultimate moral vision of human rights—that there are intrinsic limits on the power of individuals and the state to violate basic interests of the person." Richards, *supra* note 297, at 1016. Richards sees Brandeis as invoking the "general conception of human rights, founded on autonomy and equal concern and respect." *Id.* at 974.

304. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). *But see* McKay, *supra* note 298, at 278 (finding "little resemblance" between the *Griswold* right and fourth amendment privacy).

305. Interview with Paul A. Freund, in Cambridge, Mass. (Sept. 18, 1981). Professor Freund, a former Brandeis law clerk, speculated that Brandeis would have treated privacy "as a problem in the meaning of the liberty [under] the fourteenth amendment," (i.e., as a substantive due process right) to be weighed against the societal interest in regulation, rather than as a distinct constitutional right. Another former clerk, Judge Henry J. Friendly, believed that Brandeis might have approved constitutional protection of privacy in principle, but that he would not have agreed with *Roe,* especially the trimester analysis, which he would have found too mechanical. Interview with Henry J. Friendly, in New York City (Dec. 16, 1981). A similar question is posed in McKay, *supra* note 298, at 260:

> One wonders what Mr. Brandeis, as he was in 1890, or Mr. Justice Brandeis, as he was from 1916 to 1939, would have thought of these developments [enunciation of the constitutional right to privacy in *Griswold*]. Whatever may have been his original view of the matter, certainly Brandeis came ultimately to regard the right of privacy as a concept with more than one facet; one may speculate that he may have recognized that it was capable of still further growth . . . .

The doubts as to Brandeis' approval of the applications of the right of privacy to contraception and abortion derive largely from the considerable puritan strain in Brandeis' character, a trait that the former law clerks interviewed recognized. Brandeis himself acknowledged it, at least by implication. When

extension of the right of privacy to accumulations of personal data in computer memory banks, an extension that the Court approved in principle in *Whalen v. Roe*.[306] Here the interest being protected (nondisclosure of private information) is identical to that protected by both the tort right and the fourth amendment right, bringing the constitutional right of privacy full circle to its origins in the Warren-Brandeis article. Indeed, the threat to privacy posed by advancing technology was foreseen by Justice Brandeis at the time he wrote the *Olmstead* dissent. An early draft of his dissent contained this prophecy:

> The advances in science—discovery and invention—have made it possible for the Government to effect disclosure in court of "what is whispered in the closet"—by means far more effective than stretching the defendant upon the rack. By means of television, radium and photography, there may some day

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Felix Frankfurter suggested to Brandeis that Holmes was "more puritan than you," Brandeis did not deny it, but replied "vehemently" that Holmes was "more so, much more so." Felix Frankfurter notes of conversations with Brandeis, Brandeis Harvard Papers, *supra* note 43, at Box 114, file 14.

In order to project Brandeis' methods onto today's privacy issues it is necessary to separate his mode of analysis, which is timeless, from his views on sexual morality, which were shaped in the heavily Victorian atmosphere of nineteenth-century Louisville and Boston. It is highly unlikely that Brandeis himself ever considered the possibility of applying his privacy concept to contraception or abortion. Even the contraception involved in *Griswold* was "little recognized" in the polite society Warren and Brandeis had sought to protect in their ground-breaking article. McKay, *supra* note 298.

McKay suggests that Brandeis' reaction to constitutionalizing privacy might have been different for the early Brandeis, of 1890 or 1916, than for the Brandeis of 1939. Several of his former law clerks noted a certain hardening of Brandeis' ideas, a lessening of flexibility, in his later years on the Court. One of them speculated that, if the Brandeis of 1914 were "dropped into today, he would start from the same premises, but probably come out quite differently, at least in a degree, than he came out then." Interview with W. Graham Claytor, in Washington, D.C. (Dec. 3, 1981).

Another cause of doubt concerning Brandeis' reaction to the privacy cases is his well-known advocacy of judicial restraint. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). Another former law clerk believed, however, that Brandeis was not so "philosophically naive" as to deny the Court's policy-making function. But "at the same time, he obviously felt, I think, that this law-making role was a rather philosophically precarious one in a society of representative government." Interview with J. Willard Hurst, in Madison, Wis. (Oct. 28, 1981). This led to his belief that the Court's policy-making should be limited, and "that the Court should be very careful not to exercise its purely personal value judgments. It should try to be relatively impersonal, as far as that's possible, in making policy choices." *Id.*

It may also be relevant that Brandeis' views on judicial restraint developed against the backdrop of the Court's constitutionalization of laissez-faire in the *Lochner* line of cases. Once the goal of disentangling the Court from the legislative function of economic regulation was attained, he may not have felt the need to continue giving deference to legislative decisions in areas implicating the individual's right to self-development. Indeed, he was able to make this distinction while *Lochner* still lived. *See supra* note 47 and accompanying text.

306. 429 U.S. 589 (1977) (state computer records of patients obtaining prescriptions for legal drugs). Although the Court rejected the privacy attack on the New York computer storage scheme involved, it recognized that the right of privacy could protect the "individual interest in avoiding disclosure of personal matters" (citing, e.g., the Brandeis *Olmstead* dissent), as well as the interest in "independence in making certain kinds of important decisions" involved in *Roe v. Wade*. *Id.* at 599–600.

> be developed ways by which the Government could, without removing papers from secret drawers, reproduce them in court and lay before the jury the most intimate occurrences of the home. . . . Can it be that the constitution affords no protection against such invasion by the Government of personal liberty?[307]

This language was substantially modified in the final opinion, largely because Brandeis' law clerk expressed skepticism about the potential use of television for purposes of espionage.[308] Private information stored in computers certainly fits within the spirit of Brandeis' expressed concern about the threat to privacy posed by technology.[309]

Brandeis' advocacy of both tort and constitutional protection of privacy was part of his overall concern about the "curse of bigness."[310] Throughout most of his adult life, beginning long before he was appointed to the Court, Brandeis fought what has turned out to be a losing battle against bigness.[311]

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307. Freund, *supra* note 299, at 116. The quoted passage, "what is whispered in the closet," referred back to a parallel passage in the Warren-Brandeis article, *supra* note 296, at 205, *quoted in* Freund, *supra* note 299, at 116:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."

Note the use of the words "sacred precincts," later applied to the marital bedroom in Douglas' *Griswold* opinion. 381 U.S. at 485.

308. Freund, *supra* note 299, at 117–18; Interview with Henry J. Friendly, in New York City (Dec. 16, 1981). The final language of the opinion was as follows:

> Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
>
> . . . The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

Olmstead, 277 U.S. at 473–74 (Brandeis, J., dissenting). The extensive changes made in the early draft were characteristic of Brandeis' method of writing opinions.

309. *See* McKay, *supra* note 298, at 274 ("In electronic eavesdropping . . . the fears of Brandeis have come alive.").

310. Despite Brandeis' protestation that he had "no general philosophy," A. LIEF, *supra* note 292, there is an internal consistency in his positions on important issues that is striking. Brandeis first used the phrase "A Curse of Bigness" as the title of an article that later became a chapter in his book on the "money trust." L. BRANDEIS, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT (1932). The collection of Brandeis' writings that contains a reprint of the Warren-Brandeis privacy article was appropriately entitled "The Curse of Bigness."

311. Interview with J. Willard Hurst, in Madison, Wis. (Oct. 28, 1981); *see also* M. LERNER, *supra* note 285, at 106 ("For there can be no doubt that he [Brandeis] stands thus far defeated. The curse of bigness, which forms the overwhelming burden of his thinking, is still with us.").

Among Brandeis' early targets were the "money trust," as personified by the J.P. Morgan interests, the insurance industry, and the New Haven Railroad (also controlled by J.P. Morgan). *See generally* A.

Brandeis was suspicious of all concentrations of power, whether in business or government. Just as he believed that unions were necessary in order to protect the worker against concentrated economic power,[312] he also saw the necessity of protecting the individual from the growing power of government.[313] Thus the concept of individual rights against the state was a natural and necessary concept to Brandeis, leading him to use, somewhat reluctantly,[314] the *Lochner* concept of substantive due process as a vehicle for protecting individual rights against state action. Though he opposed Lochnerism in its usual context, when it was used to invalidate economic regulation, he accepted it in the human rights context, where it meant that "all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states."[315] Such fundamental rights could be restricted only when restriction was "required in order to protect the state from destruction or from serious injury, political, economic or moral."[316] Thus did Brandeis enunciate what has since evolved into the strict scrutiny standard applied to legislation restricting fundamental rights: such legislation is constitutional only if necessary ("required") in order to further a compelling state interest (protecting the state "from destruction or from serious injury"). It is this "fundamental rights" approach that is under attack in the current debate over judicial review,[317] but its vulnerability to attack derives from its emphasis on classifying rights rather than on assessing state interests, an emphasis that owes much to Lochnerphobia.

Mason, *supra* note 279.

> Diffusion of power was his solution for the curse, in the government as in industry:
>
> For a century our growth has come through national expansion and the increase of the functions of Federal Government. The growth of the future—at least of the immediate future—must be in quality and spiritual value. And that can come only through the concentrated, intensified striving of smaller groups. The field for special effort should now be the State, the city, the village—and each should be led to seek to excel in something peculiar to it. If ideals are developed locally—the national ones will come pretty near taking care of themselves.

4 LETTERS OF LOUIS D. BRANDEIS 497–98 (M. Urofsky & D. Levy eds. 1975).

312. *See, e.g.*, Jaffe, *Was Brandeis An Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 992 (1967).

313. Perry has expressed the thought admirably: "The function of human rights is to protect the individual from the leviathan of the state. As government increases in size and power, government's capacity to harm individuals—whether deliberately or unthinkingly—increases too, and so the matter of human rights becomes even more important." M. PERRY, *supra* note 1, at 164.

314. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("despite arguments to the contrary which had seemed to me persuasive").

315. *Id.; see also supra* notes 42–47 and accompanying text.

316. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *see* Jaffe, *supra* note 312, at 992–93.

317. *See, e.g.*, Brest, *supra* note 55, at 131.

The Court's adoption of the strict scrutiny standard was a direct result of its overly zealous rejection of *Lochner*. *Carolene Products* and the cases that followed it[318] announced a strong presumption of constitutionality for legislative judgments, which might have left individual and minority rights at the mercy of legislative majorities were it not for the caveat expressed in footnote four, that there might be a "narrower scope for operation of the presumption of constitutionality" in certain cases.[319] Later cases enunciated a standard that, in effect, created a presumption of *un*constitutionality for legislation restricting fundamental rights, which could be rebutted only by showing that the restriction was necessary to further a compelling state interest.[320] It is this double standard that has led to the emphasis on classifying rights in terms of their degree of fundamentalness, opening the Court to the criticism that it is choosing fundamental values or constructing new rights.[321]

As it evolved, the double standard gave strict scrutiny to legislation restricting fundamental individual rights but virtually no scrutiny at all to economic legislation. Identification and definition of fundamental rights became the key because the standard of review usually determined the outcome. This minimized the need for overt balancing of individual rights against state interests, but it was a departure from Brandeis' vision. Balancing was an essential ingredient in the Brandeis analysis. He emphasized not only the fundamental nature of the right involved, but also the necessity for its restriction by the state.[322]

Even assuming that the *Lochner* majority was right in treating liberty of contract as a fundamental right, Brandeis would still have found economic regulation constitutional because it was necessary to protect the state from

318. *E.g.*, Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

319. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). This was a distinction that Brandeis had made while *Lochner* was still in force. *See supra* notes 43–47 and accompanying text.

320. The strict scrutiny standard was first enunciated in an equal protection (racial classification) case, Korematsu v. United States, 323 U.S. 214 (1944), which upheld an executive order excluding persons of Japanese origin from certain areas on the West Coast. Racial classifications, Justice Black wrote, were "immediately suspect," and therefore subject to "the most rigid scrutiny," and were justified only by "pressing public necessity." *Id.* at 216. The term "strict scrutiny" was used two years earlier in Skinner v. Oklahoma, 316 U.S. 535 (1942), together with a reference to marriage and procreation as being "fundamental," and "one of the basic civil rights of man," *id.* at 541, but without enunciating a clearcut standard of review. Justice Douglas said merely that "strict scrutiny" in sterilization cases "is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Id.* Nevertheless, he purported to give the state the same "large deference" as had previously been given in equal protection cases.

321. *See, e.g.*, Bork, *supra* note 9, at 8, discussed *infra* notes 389–405 and accompanying text.

322. *See* Interviews with Paul A. Freund and Henry J. Friendly, *supra* note 305.

serious economic injury.[323] Economic liberty or liberty of contract could well be considered an aspect of the full development of each individual that Brandeis' concept of democracy required,[324] but economic liberty does not exist in a vacuum. The marketplace is preeminently characterized by interaction between individuals and groups, and thus it is inevitable that the exercise of liberty by one individual is going to "interfere with the exercise . . . of a like right" by one or more fellow citizens.[325] In practice, economic liberty turns out to mean liberty for the strong to take advantage of the weak.[326]

Brandeis perceived that the problem with Lochnerism was that the courts had been "largely deaf and blind" to the economic and social revolution that had taken place in the latter half of the nineteenth century.[327] He saw that the courts were "reasoning from abstract conceptions," rather than from life,[328] and that the courts "lack[ed] understanding of contemporary industrial conditions."[329] His remedy was not to displace the courts, or to restrict their power and discretion, but to fit them to "perform adequately the functions of harmonizing law with life."[330] Brandeis could see that the actual effect of striking down regulatory legislation based on the *Lochner*

323. Recall that under the *Whitney* test, even fundamental rights are "subject to restriction, if the particular restriction proposed is *required* in order *to protect the State from* destruction or from *serious injury,* political, *economic* or moral." Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (Emphasis added).

324. *See supra* note 290 and accompanying text; *see also* J. CHOPER, *supra* note 15, at 84:

> Although these rulings benefited persons of property and affluent minorities rather than unpopular individuals and downtrodden groups and, hence, may be disapproved under contemporary libertarian standards, the fact is that they served the ideal of limited democracy and secured interests that were originally regarded as fundamental.

325. J. DEHAAS, *supra* note 290, at 220.

326. L. BRANDEIS, *The Living Law,* in THE CURSE OF BIGNESS 319 (1934) (observing that the Social Darwinist "survival of the fittest" in practice meant "the devil take the hindmost").

327. *Id.* at 318–19:

> Since the adoption of the Federal Constitution, and notably within the last fifty years, we have passed through an economic and social revolution which affected the life of the people more fundamentally than any political revolution known to history. . . .
>
> Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of the individual and of the sacredness of private property. . . . In the course of relatively few years hundreds of statutes which embodied attempts (often very crude) to adjust legal rights to the demands of social justice were nullified by the courts, on the grounds that the statutes violated the constitutional guarantees of liberty or property.

328. *Id.* at 320; *cf.* Miller, *supra* note 186, at 674 ("[T]he notion of arms-length bargaining in nineteenth-century contract law was more fantasy than fact.").

329. L. BRANDEIS, *supra* note 326, at 323.

330. *Id.*

concept of liberty of contract was to "cut down freedom" for one of the parties.[331] The justification for economic regulation was that intervention by the state was necessary to ensure that the economic liberty of *both* parties was protected. Otherwise the inequality of bargaining power between contracting parties would make liberty of contract a meaningless abstraction, or worse, an instrument of oppression:

> In old times law was meant to protect each citizen from oppression by physical force. But we have passed to a subtler civilization; from oppression by force we have come to oppression in other ways. And the law must still protect a man from the things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind.
>
> There is no such thing as freedom for a man who under normal conditions is not financially free. We must therefore find means to create in the individual financial independence against sickness, accidents, unemployment, old age and the dread of leaving his family destitute, if he suffer premature death. For we have become practically a world of employees; and, *if a man is to have real freedom of contract in dealing with his employer, he must be financially independent of these ordinary contingencies.* Unless we protect him from this oppression, it is foolish to call him free.[332]

For the majority in the *Lochner* line of cases, however, liberty of contract was an abstraction, divorced from the realities of the economic marketplace. In their world, "the employer and the employé [had] equality of right, and any legislation that disturb[ed] that equality [was] an arbitrary interference with the liberty of contract which no government [could] legally justify in a free land."[333] If inequality of bargaining power existed at

331. Felix Frankfurter's notes of conversations with Brandeis, Brandeis Harvard Papers, *supra* note 43, at Box 114, file 14.

In what Professor Freund has described as "one of his most coldly passionate opinions," P. FREUND, *supra* note 284, at 138, Brandeis warned the Court that in exercising its "high power" to declare statutes unconstitutional under substantive due process, "we must ever be on guard, lest we erect our prejudices into legal principles." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

332. Poole, *Foreword* to L. BRANDEIS, BUSINESS—A PROFESSION lii–liii (1914) (quoting Brandeis) (emphasis added). Brandeis applied the same principle to property rights:

> Property must be subject to that control of property which is essential to the enjoyment by every man of a free individual life. And when property is used to interfere with that fundamental freedom of life for which property is *only a means,* then property must be controlled. This applies to the regulation of trusts and railroads, public utilities and all the big industries that control the necessities of life. Laws regulating them, far from being infringements on liberty, are in reality protections against infringements on liberty.
>
> Property is only a means. It has been a frequent error of our courts that they have made the means an end.

Id. at liii–liv (quoting Brandeis).

333. Adair v. United States, 208 U.S. 161, 175 (1908) (invalidating federal legislation on "yellow dog" contracts under fifth amendment due process clause).

all, it was merely the natural order of things, and the law could not take it into account:

> [I]t is said . . . to be a matter of common knowledge that "employés as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, *wherever the right of private property exists, there must and will be inequalities of fortune;* and thus *it naturally happens that parties* negotiating about a contract *are not equally unhampered by circumstances.* This applies to all contracts, and not merely to that between employer and employé. . . . *[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.* But the [due process clause of the fourteenth amendment] recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either.[334]

Brandeis understood the complexities of the economy better than his colleagues.[335] He dealt with realities, not abstractions; consequently, he recognized that legislatures were better equipped to deal with the realities of the marketplace than were the courts.[336] He therefore urged great deference to legislative judgments in economic matters, even judgments with which he disagreed.[337] But legislatures could not claim a similar expertise in dealing with individual human rights; therefore, the same deference could not be applied to legislation restricting noneconomic rights.[338] Here, it was courts, rather than legislative majorities, which were

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334. Coppage v. Kansas, 236 U.S. 1, 17 (1915) (emphasis added) (invalidating a state law outlawing "yellow dog" contracts). "[A] premise of legal analysis during the *Lochner* period was the inviolability of the naturally unequal distribution of ability and fortune among persons." Lupu, *supra* note 78, at 987.

Coppage was decided a year before Brandeis joined the Court, but Justice Holmes dissented:

> In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that *it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins.* . . . [T]here is nothing in the Constitution of the United States to prevent it.

Coppage, 236 U.S. at 27 (Holmes, J., dissenting) (emphasis added). Justice Brandeis would have agreed, but unlike Holmes, he also would have had no doubt that the workman's belief was right. *See* Jaffe, *supra* note 312.

335. Among Brandeis' many skills, Walton Hamilton noted one "distinctly his—to contrive to make terms between the law and the secular subjects upon which it operates." Hamilton, *supra* note 288, at 1082.

336. *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting).

337. *See* Freund, *supra* note 299, at 109.

338. Thus Brandeis was willing to apply substantive due process to laws restricting individual rights in the context of family autonomy in matters of education. *E.g.*, Meyer v. Nebraska, 262 U.S.

preeminently fitted for the task of protecting the individual from overreaching by the state.[339] So it was that, although Brandeis strongly disapproved of using substantive due process to strike down economic legislation, he was nevertheless willing to employ substantive due process to protect the liberty of parents to control the education of their children.[340] This was not really a question of the parents' rights being more important, or more *fundamental,* than liberty of contract. It was rather that the parents' decision to have their children study a foreign language,[341] or attend a private school,[342] had a minimal impact on the rights of others.[343] There was insufficient justification for legislative interference with the parents' decision.

Brandeis' "zeal for privacy"[344] can thus be seen as an effort to protect those personal decisions so important to the individual's self-development, which do not implicate legislative power because they do not significantly interfere with the like rights of others. The need for such protection has grown over the years. "[A]ll the forces of a technological age" have operated to "narrow the area of privacy."[345] The constitutional right enunciated in *Griswold* is a direct descendent of the substantive due process rights first protected in *Meyer* and *Pierce;* it responds to a need for protection against invasions of privacy and autonomy far more serious than the snooping of the press, which led to the original Warren-Brandeis article on privacy,[346] and far more widespread than wiretapping, which inspired Brandeis' *Olmstead* dissent.[347] The same revolution that gave rise to the need for social and economic legislation to protect "that fundamental freedom of life for which property is *only a means,*"[348] also created conditions that threatened individual privacy and autonomy—the core of

390 (1923); *see* Freund, *supra* note 299, at 112; Jaffe, *supra* note 312, at 993.

339. *See, e.g.,* Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). The *Whitney* concurrence demonstrates that where individual rights (there, first amendment rights) were concerned, Brandeis was unwilling to accept as final the legislature's determination that clear and present danger existed. However reasonable the legislative judgment that such danger arose from the activities described in the California criminal syndication statute, the individual was entitled to the opportunity of demonstrating that no sufficient danger arose from *her* particular activities.

340. *See supra* notes 43–47 and accompanying text.

341. Meyer v. Nebraska, 262 U.S. 390 (1923).

342. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

343. *See supra* note 291 and accompanying text.

344. *See supra* note 301 and accompanying text.

345. Emerson, *supra* note 17, at 229.

346. Unwanted publicity suffered by Brandeis' partner, Samuel Warren, is generally credited as the inspiration for the Warren-Brandeis article. *See, e.g.,* A. LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 51 (1936); *see also* 1 LETTERS OF LOUIS D. BRANDEIS 302–03 (M. Urofsky & D. Levy eds. 1971).

347. *Olmstead,* 277 U.S. at 478.

348. Poole, *supra* note 332, at liii (quoting Brandeis) (emphasis in original).

that same fundamental freedom of life. Indeed, the very legislation needed to protect individual liberty from encroachment by private concentrations of power inevitably raised a new threat to liberty by contributing to the growth of government power.[349] Thus there is increasing need to protect the individual from "the gathering forces of big government."[350] And, since this time the threat comes not from the courts but from the political branches, the solution must lie with the judicial branch.

The fundamental right of personal privacy and autonomy, rooted as it is in Brandeis' own conception of protection for the "sacred precincts of private and domestic life,"[351] is at the very least an appropriate solution. The attacks upon it reflect the need, forty years after the demise of *Lochner,* to articulate a principled basis for distinguishing the right of privacy from the *Lochner* brand of substantive due process. It surely is not necessary to repudiate all of substantive due process, much less the entire mode of noninterpretive judicial review, in order to make sure that *Lochner* remains decently buried.[352]

VI. THE GHOST OF *LOCHNER*

> [A]ll of our recent constitutional history would have been more coherent . . . had the Supreme Court never abandoned substantive due process but had merely excised its *laissez-faire* excrescence.[353]

Liberty under the due process clause has become "an enormous interpretive embarrassment in constitutional law."[354] The Court's acknowledgment in *Roe* that the constitutional right of privacy is grounded in due

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349. *See* M. PERRY, *supra* note 1, at 164 ("As government increases in size and power, government's capacity to harm individuals—whether deliberately or unthinkingly—increases too, and so the matter of human rights becomes even more important.").

350. McKay, *supra* note 298, at 279.

351. Warren & Brandeis, *supra* note 296, at 195.

> What is at stake here is nothing less than the basic moral vision of persons as having human rights: that is, as autonomous and entitled to equal concern and respect. This vision, correctly invoked by Warren and Brandeis in developing rights to information control, similarly underlies the constitutional right to privacy.

Richards, *supra* note 297, at 975. *But see* Perry, *supra* note 181, at 440 (advocating abandonment of "privacy" semantics, as confusing).

352. *See* Grey, *supra* note 243, at 711 n.35:

> It now seems that the ultimate punchline in the criticism of a constitutional decision is to say that it is "like *Lochner.*" [citing Ely] . . . *Lochner* is only one of thousands of decisions in the history of the Court that invoke a noninterpretive mode of constitutional adjudication; if it was a bad decision, as I think it was, it by no means follows that the general mode of adjudication it represents is illegitimate. There are many bad decisions in the mode of pure interpretation.

353. Henkin, *supra* note 27, at 1427.

354. Gerety, *supra* note 1, at 159 ("Why not, then, a theory of liberty? For a thousand reasons, all of which come to one: *Lochner.*").

process liberty[355] raises the fear of a return to the unbridled judicial discretion that characterized the *Lochner* era. Forty years of repeated rejection of *Lochner*[356] have left a climate that is inhospitable to any form of substantive due process.

Yet, despite frequent interment, substantive due process never really died. It was the means by which first amendment guarantees were first protected against encroachment by state action,[357] a protection that continued unabated throughout the time when the Court was periodically burying *Lochner*. Moreover, such substantive protection has not been confined to rights explicitly mentioned in the Bill of Rights. The right to travel abroad was accorded protection from federal action as part of the "liberty" safeguarded under the due process clause of the fifth amendment.[358] The problem is not that substantive due process still lives, but that its continued life has not been adequately acknowledged or justified.

In principle at least, substantive due process has "respectable claims in the philosophy of government which was our original inheritance."[359] *Lochner* was a misapplication of the principle,[360] so its repudiation certainly did not require total rejection of substantive due process. But that

355. *Roe*, 410 U.S. at 153.

356. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941). The rejection of *Lochner* may have begun even earlier with Nebbia v. New York, 291 U.S. 502 (1934), and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See* G. GUNTHER, *supra* note 3, at 533–34.

357. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925). Of course, the true interpretivist will object even to this use of substantive due process. *See* R. BERGER, *supra* note 9, at 270–74.

358. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958) (statutory interpretation to "avoid" constitutional issue).

359. Henkin, *supra* note 27, at 1412.

> Ours is an Eighteenth Century Constitution, reflecting Enlightened views of popular sovereignty, and of government limited in powers and purposes. The Constitution does not confer private rights . . . . The Constitution does not even command that government grant, promote or extend private rights; it only places limits on the infringement of private rights by government, both the rights specified and all others "retained by the people."
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> Reflecting contemporary philosophy, out of Locke (filtered through Blackstone) with some Rousseau, the Constitution blended several related elements—the original equality and independence of the individual, the sovereignty of the people . . . , limited government by consent of the governed for purposes determined by them, and rights retained under government.

Id. Professor Henkin found these elements reflected in the Preamble to the Constitution, the ninth amendment, and the Declaration of Independence (Ely's "brief"). *Id.*

360. L. TRIBE, *supra* note 16, § 11-2, at 566. According to Tribe, the error of *Lochner* "was not in invoking a value the Constitution did not mark as special; the text evinces most explicit concern with 'liberty,' 'contract,' and property. The error lay in giving that value a perverse content." *Id.*; *see also* Ely, *supra* note 229, at 15 ("[B]y and large it is the particular values the Court chose to protect—notably 'liberty of contract'—and not the general methodology of identifying fundamental values and enforcing them on the political branches, that has come in for criticism."); Lupu, *supra* note 78, at 989 (The survival of *Meyer* and *Pierce* "suggests that the only durable objection to the *Lochner* era's handiwork is that it generally selected the 'wrong' values for protection.").

is the form repudiation took, and still takes. From Black to Ely, those who attack substantive due process do so out of fear that the Court will repeat the errors of the *Lochner* era, that it will again identify the "wrong" liberty and so frustrate the will of the majority. To avoid this danger, they would extract all substantive content from the word "liberty," but clearly this exalts majoritarianism far above the value placed upon it by the framers, who showed a healthy skepticism for the tyranny of majorities when they built into the constitutional scheme a number of restraints designed to curb majority rule.[361] The cure for Lochnerism is not Lochnerphobia. What is needed is a frank acknowledgment of the continuing vitality of substantive due process, coupled with a conscientious effort to enunciate a sound constitutional rationale for the substantive due process right of privacy.[362]

Safeguarding the right of individuals to conduct their private lives without unnecessary interference from the state poses none of the hazards of *Lochner*. When the Court invalidated economic legislation, it disabled the people's elected representatives from dealing with economic problems, overruling the decision of the majority that certain areas of public life required regulation by government. Invalidation of a regulation simply created a power vacuum that was quickly filled by private power.[363] When the Court acts to protect an individual's private life from government

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361. Ely concedes as much. *See* J. ELY, *supra* note 6, at 7–9. What he does not concede is the power of "politically unaccountable judges [to] select and define the values to be placed beyond majority control." *Id.* at 8. The answer to Ely is that those values have already been selected and placed beyond majority control by the Constitution itself. The Court's task is to identify the values and apply them in disparate social contexts—thus perhaps "defining" them, but in a much more limited sense than Ely envisions.

The Constitution itself is the element that is "most embarrassing" to the view that "majority will is the guiding principle of our political affairs." Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 443 (1981).

362. The Court's failure to enunciate a sound constitutional rationale is the strongest ground for criticism of *Roe*. *See, e.g.*, A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976):

> My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences.

Unlike Ely, Professor Cox is not troubled by the Court's use of the due process clause as the source of the right. *Id.* ("I find sufficient connection in the Due Process Clause."); *see also* Morgan, *supra* note 168, at 1724 ("Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much.").

363. For an interesting discussion of the "continuity" between public power and private power in the *Lochner* era, see Nerken, *A New Deal for The Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 339–47 (1977); *see also* G. GILMORE, THE DEATH OF CONTRACT 95–96 (1974) ("[A] system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful."), *quoted in* Nerken, *supra*, at 332 n.105; *cf.* L. BRANDEIS, *supra* note 326.

interference, however, the majoritarian processes are not impeded in any significant way, because the public need for this kind of regulation is much less urgent.[364] The Court is merely fulfilling its historic constitutional role of protecting the individual from the state. All that is at stake here is the power of the majority to impose its will on the individual in matters that are of little real concern to the state, but usually of great concern to the individual. In *Carolene Products* footnote four terms, it is the state against the smallest of all minorities, the minority of one.[365] Surely this, too, is an area in which the political processes cannot be relied upon to protect the rights of the minority in question.

Of all the areas of protected privacy identified by the Court, the abortion decision may be the least susceptible to regulation by the political processes. For a hundred years, the legislative response to this agonizing human dilemma was the simplistic one of near-total prohibition. Political pressure for reform yielded limited results in the late sixties, leading to the less restrictive laws exemplified by the Georgia statute invalidated in *Doe v. Bolton*.[366] The intense political pressure that developed in opposition to abortion reform made it unlikely that even this limited reform could be

364. *See generally* J. CHOPER, *supra* note 15; Perry, *supra* note 130. This is not a question of economic rights being less important than "personal" rights, as is sometimes argued, but a question of how necessary regulation by the state has become. There may have been a time when economic life was simple enough, and personal enough, so that economic freedom could realistically be considered a basic freedom. Today, however desirable such freedom might be, it is unrealistic to suppose that it is attainable in our present complex economy. On the other hand, our complex society and technological advances have greatly increased the opportunity for intrusion by both government and individuals into private lives, so the need for constitutional protection in this area is greatly increased.

> The *Griswold-Eisenstadt* limitation on the police power of the states is intelligible (as Justice Stewart's concurrence in *Roe* suggests) only as a declaration that conception (for most purposes at least) does not implicate the public welfare. The most forthright and cogent explanation of the *Griswold-Eisenstadt* result is that legislation restricting contraception is constitutionally ultra vires because it intrudes on a personal matter not involving, and hence beyond, the public welfare. The power to police the public welfare may not extend to "rights which are purely and exclusively private."

Perry, *supra* note 130, at 705 (quoting Munn v. Illinois, 94 U.S. 113, 124 (1876)).

365. *Cf.* Ackerman, *supra* note 55, at 722.

366. 410 U.S. 179 (1973). Beginning with Colorado in 1967, about one fourth of the states had adopted such legislation, patterned on section 230.3 of The American Law Institute's MODEL PENAL CODE. *Id.* at 182. The Georgia statute permitted abortion when the physician considered it medically necessary because:

> (1)A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
>
> (2)The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
>
> (3)The pregnancy resulted from forcible or statutory rape.

Id. at 183.

adopted everywhere.[367] This, together with the restrictions embodied in the new abortion legislation, made the availability of abortion increasingly turn on the financial resources of the pregnant woman.[368] The emotional nature of the issue and its entanglement with questions of moral judgment and religious doctrine made it ill-suited for political solution.[369] If this situation did not compel the Court to intervene on behalf of the pregnant woman's freedom of choice, it at least provided adequate justification for the intervention, even in footnote four terms.[370]

The criticism of *Roe* has largely ignored, or has trivialized, the pregnant woman's need for protection against the majoritarian process. It has focused instead on the Court's failure to deal adequately with the conflicting rights of the unborn child.[371] But to state the problem as involving "two liberty interests rather than one"[372] is to assume away the very question at issue: whether the fetus is a "person" entitled to protection not only of its liberty, but also of its life, under the fourteenth amendment.[373] However

367. *See, e.g.*, L. TRIBE, *supra* note 16, at 929–30; Vinovskis, *Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior*, 77 MICH. L. REV. 1750, 1752 (1979). Public opinion polls showed a leveling off of support for the pro-choice position, roughly corresponding with the increase in vocal opposition to the abortion decisions. *See* Uslander & Weber, *supra* note 157.

368. A woman's ability to secure an abortion would often depend on her ability to travel to another state, or to secure the services of one or more physicians to attest to her need for the procedure.

369. *Cf.* Bennett, *supra* note 158, at 993–1008.

The restrictions on abortion retained in *The Model Penal Code* were largely designed to forestall anticipated religious opposition. *See* Schwartz, *supra* note 159, at 683–86.

370. Ely avoids recognizing abortion as a question of the individual's rights against the state by casting it in terms of a right of *women* as a group; he then contrasts the political representation of women with that of fetuses. Ely, *supra* note 3, at 933–34 ("Compared with men, very few women sit in our legislatures, a fact I believe should bear some relevance . . . to the appropriate standard of review for legislation that favors men over women. But *no* fetuses sit in our legislatures."). The fact that few women sit in our legislatures may or may not have some bearing on the kind of abortion legislation so far produced. But privacy is an individual right, not a group right. The abortion decision is a private, individual decision, and the question is who will make the decision, the woman or the state. An all-female legislature would have no greater right to impose its decision on the individual woman than would any other legislature. The fact that no fetuses sit in the legislature seems to have had little effect on the degree of legislative protection accorded to fetal rights, as witness the proliferation of legislation forbidding the funding of abortions at both state and federal levels. *Cf.* Bennett, *supra* note 158, at 995–96 n.71.

Even if it were accurate to speak of privacy as a group right, it is doubtful that the relevant group in the abortion context would be *all* women. It may be more accurate to view women seeking abortions as a sub-class, and one with which the larger class of women has some difficulty identifying. *See* Cox, Book Review, 94 HARV. L. REV. 700, 710–11 (1981) (reviewing J. ELY, DEMOCRACY AND DISTRUST (1980)). "Are not women who seek abortion at least 'fallen women' according to 'outmoded stereotypes,' so that we must suspect that an outmoded stereotype may have unduly influenced the legislature?" Cox, *supra*, at 710.

371. *See* Gibbons, *supra* note 206, at 273; Ely, *supra* note 3, at 923–26.

372. Gibbons, *supra* note 206, at 273.

373. Justice Blackmun's opinion attempts to answer this question by an extended discussion of historical data reflecting legal, medical, philosophical, and social attitudes toward the rights of the

complex and intractable the philosophical and religious issues raised by this question may be, the Supreme Court clearly reached a defensible conclusion on the *legal* issue. The states' arguments for fetal personhood were not supported by the very abortion laws they defended. Even the restrictive Texas statute involved in *Roe* implicitly treated the fetus as less than a full-fledged person; it permitted abortion "for the purpose of saving the life of the mother."[374] When the rights of the mother and fetus came into direct conflict, the mother's right was given greater weight. Moreover, the Texas statute, like many other such statutes, was directed toward the person performing or procuring the abortion rather than the pregnant woman herself.[375] The penalty was two to five years in the penitentiary, hardly a fitting penalty for intentionally taking the life of a person.

The fact that the law has never treated the fetus as a person does not mean, however, that the state has no interest in protecting it. The due process question actually posed in *Roe* was whether the mother's right to privacy outweighed the state's interest in protecting the fetus' right to potential life. This question the Court answered only in conclusory terms: the state's interest in protecting fetal life becomes compelling at the point where the fetus is capable of surviving outside the womb. At that point, the fetus' right to begin its life outweighs all but the mother's right to continue hers.[376] This is certainly a rational solution to a problem so complex as to be virtually insoluable, but the Court's conclusion was not so self-evident as to require no elaboration.

No amount of justification could possibly suffice to persuade anyone who is convinced, as a matter of religious or moral belief, that a full-fledged human being comes into existence at the moment of conception. Once this basic premise is assumed and is no longer open to rational debate, all other conclusions flow inevitably from it. From this point of view, *Roe* is clearly wrong, and it would be just as wrong if it had been decided by a legislature rather than a court.[377] But the arguments that characterize *Roe* as

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unborn. *Roe*, 410 U.S. at 129–52; *see also id.* at 156–59.

If the fetus were found to be a person entitled to fourteenth amendment protection, the argument could be made that equal protection requires the state to extend to fetuses the protection of laws against homicide and child abuse, under a burden on fundamental rights (here, right to life) analysis. *See supra* note 125.

374. *Roe*, 410 U.S. at 118.

375. *Id.* at 117.

376. *Id.* at 164–65 (after viability, the state may prohibit abortion, except where necessary to preserve the life or health of the mother).

377. *See* Glover, *supra* note 160.

It is this point of view that logically supports the charge that the Supreme Court in *Roe* was merely substituting its answer to the question of "when life begins" for that of the legislature. When an individual believes that she knows to a moral certainty what the "right" answer is—and the legislature has supported that choice—the Court, in overturning the legislative choice, is simply substituting its

Lochnerism proceed from different premises. These arguments may even concede, as Ely does, that the Court's disposition would have been entirely acceptable if it had come from a legislature rather than a court. This is the kind of criticism that might have been defused by a more careful discussion of the rights and interests involved in regulation of abortion, particularly, as Brandeis teaches, the interests asserted by the state. Such a discussion would at least have clarified some of the distinctions between *Roe* and *Lochner.*

For one thing, the Court might have placed more emphasis on the first amendment implications of the pregnant woman's right to choose whether to become a parent. When the state denies her the right to make this choice, so crucial to her personal life, when it seeks to force upon her the moral and religious views of others, this at least raises a question whether her rights of conscience and belief, including her right to the free exercise of *her* religious beliefs, have not been violated. Her first amendment rights, as well as her equal protection rights and her rights of privacy and autonomy under the fourteenth amendment, are of sufficient weight to impose upon the state a duty to justify the denial by a showing of compelling interest.

The primary interest argued by the state in *Roe,* and cited by most of its critics, is the interest in preserving the life of the fetus. *Roe* concedes the importance of this interest; once the fetus achieves viability, the state's interest in preserving its life outweighs the mother's rights so as to justify regulation or prohibition of abortion, unless the mother's life or health is endangered. In order to justify drawing the line at viability, the Court needed to be more explicit in its conceptualization of fetal rights as growing over time. The most relevant legal precedent, *Griswold,* had already established the individual's right to decide whether to use contraceptives, and some forms of contraceptives operate after conception. It would seem, therefore, that the state's position that its interest in fetal life was compelling from the moment of conception was already all but foreclosed by *Griswold.* Unless the Court was prepared to retreat from *Griswold,* the problem was to identify some event *after* conception of sufficient significance to boost the state's interest to the compelling point.[378] Three possibilities were identified by the Court: quickening, viability, and live birth.

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own answer—the "wrong" answer—for that of the legislature. No person so convinced of the rightness of her answer could ever accept the notion that what the Supreme Court really said was that *no* government entity, court or legislature, is entitled to answer that basic moral question for the individual most closely involved. Nor could such a person accept the idea that *Roe* would protect *her* choice—the "right" choice—as readily as it now protects the choice to have an abortion. (But, of course, if it were *his* "right" answer, the only way to protect it would be by legislation, which may be a significant part of the problem.)

378. *But see* King, *supra* note 131, at 1673–74 (suggesting that conception is not an event, but "occurs over an extended time period").

The historical roots of abortion legislation suggested quickening;[379] the law in other areas pointed to live birth as the decisive event.[380] The Court's choice of the intermediate point, viability, recognized both the need to bring abortion laws into closer harmony with other law and the fact that abortion is a far more serious invasion of fetal rights than, say, denial of a right to sue in tort.

There are also, concededly, policy reasons for placing the dividing line at viability. Placing it at quickening would have foreclosed abortion in many cases of severe fetal abnormalities that are undetectable in early pregnancy. Drawing the line at live birth would have intolerably blurred the distinction between feticide and infanticide and would have created agonizing problems of proof. It would be absurd to argue that these and other questions of policy had nothing to do with the Court's choice of viability as the touchstone. The point is that the Court does not exceed its proper sphere unless and until questions of policy are the *only* criteria used in reaching a decision. So long as the decision can be justified in terms of constitutional values and traditional methods of rational judicial decisionmaking, it should not be dismissed as judicial legislation, or Lochnerism. Rather, the fact that a decision finds support in policy as well as in rational constitutional analysis should count as a point in its favor.

One might still argue, as Brandeis may well have argued, that the Court should have stayed out of the controversy as a matter of judicial self-restraint.[381] But Brandeis' self-restraint would not have been motivated by the fear of charges of Lochnerism. Anyone with his finely developed ability to analyze and distinguish complex fact situations would not have equated the personal changes caused by pregnancy with the changes wrought by the industrial revolution, which had brought about the legislation invalidated in *Lochner*. Industrialization brought widespread restructuring of our social and economic life, which obviously affected many lives. Legislative responses to the industrial revolution represented an attempt to protect individuals against the new dangers that resulted from those social and economic changes. A considerable quantity of data was available to legislatures to aid them in arriving at decisions of policy to be embodied in regulatory legislation. These were the kinds of policy decisions legislatures are particularly well-qualified to make and enforce.[382] When the Supreme

379. *See Roe*, 410 U.S. at 132–34.

380. *See id.* at 161–62 (discussing tort law and inheritance law).

381. Alternatively, considerations of judicial restraint might find *Roe* itself justifiable because of the severity of the Texas statute involved, but draw the line at the less sweeping statute invalidated in Doe v. Bolton, 410 U.S. 179 (1973), and later cases. *See* Ginsburg, *supra* note 173, at 381–82; Freund, *Storms Over The Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983); *cf.* Bennett, *supra* note 158, at 1008.

382. The appropriateness of certain kinds of issues for legislative determination was a key element in Brandeis' doctrine of judicial restraint. *See, e.g.*, International News Serv. v. Associated Press, 248

Court threw out those legislative policy decisions, it did so, not on the basis of conflicting data, but on the basis of an abstract construct of its own, embodying philosophical views never openly acknowledged.

With abortion legislation, the situation is significantly different. It is the legislative judgments themselves that embody philosophical (and religious) views in an area where there are "fundamentally conflicting views of morality."[383] Such legislative judgments are not based on economic or social data and do not protect society against any concrete danger. No stock market will crash, no millions will face unemployment if the legislature fails to act. Abortion laws attempt to solve, not so much a social problem, as an individual problem of great complexity and great import to the individual involved. In this context, the intractable nature of the problem leads to the conclusion, not that it should be left to the legislatures, but that it should be left to the individual. Whatever the decision may be, it is the individual who is going to have to deal with its consequences, not the state. When the consequences are so grave and far reaching, only the person who must bear them should be entitled to make the choice.[384] It is the nature of the state's interests,[385] as well as the fundamentalness of the individual

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U.S. 215, 267 (1918) (Brandeis, J., dissenting):

> Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear.

383. In present day, heterogeneous, secular American society, the law of abortion operates in an area of fundamentally conflicting views of morality. Here is no question of imposing conformity to community consensus on a few heretics or visionaries, but of employing the machinery of the state to coerce some major groups in the population to conform to the ideals of others. It is not a question of restricting the freedom of a few eccentrics to avoid inflicting great psychic injury on the bulk of the population, but of restricting the freedom of scores of millions of citizens, having conflicting but equally respectable sensibilities, to be protected.

Schwartz, *supra* note 159, at 683.

384. *See* Tribe, *supra* note 150, at 40:

> A woman in contemporary America who is coerced into submitting herself, at the insistence of a man empowered by law to control her choice, to the pains and anxieties of carrying, delivering, and nurturing a child she did not wish to conceive or does not want to bear and raise, is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude.

Under restrictive abortion laws, women are "being used in a way no one else . . . in our society is ever used . . . . [T]heir bodies are being taken over by the state for the benefit of third persons . . . ." Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1630–31 (1979) (constructing a rationale for *Roe* based on the "law of samaritanism"). It is an added irony that abortion laws are of limited effectiveness in protecting fetal life, as witness the prevalence of illegal abortion in the pre-*Roe* period.

385. What distinguishes morals legislation (including abortion legislation) from other penal laws is the "absence of ordinary justification for punishment by a non-theocratic state. The ordinary justification for secular penal controls is preservation of public order." Schwartz, *supra* note 159, at

interests involved, that distinguishes *Roe* from *Lochner,* and the Court's failure to address this important distinction can be traced to Lochnerphobia.

One of the more insidious outgrowths of Lochnerphobia has been the aversion it has engendered to the balancing of interests. Justice Black's suspicion of balancing[386] was an aspect of the same distrust of judicial discretion that animated his abhorrence of *Lochner*'s "natural law due process philosophy."[387] The result has not been to do away with balancing—indeed, judicial decisionmaking would hardly be possible without it[388]—but to drive it underground. Identification of a right as "fundamental" has become the key inquiry—the mechanical process of definition has replaced the art of balancing. So we find the Court in *Griswold* and *Roe* more concerned with the fundamentalness of the right of privacy than with the absence of sufficient justification for state interference with the right. This has made it easy to cast the debate over judicial review, as Bork does, in terms of the court's choice of "fundamental values"[389] or the construction of "new rights."[390] This formulation leads inexorably to the conclusion that noninterpretive review is nothing more than "constitutional policymaking."[391]

Bork's formulation, along with his insistence on confining the Court to value-neutral principles,[392] enables him to equate the facts of *Griswold*

669.

386. This is apparent in the first amendment cases. *See, e.g.*, Konigsberg v. State Bar, 336 U.S. 36, 56 (1961) (Black, J., dissenting) (attacking "the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a state might have interest sufficient to justify abridgement of those freedoms"). In the flag-burning case, Street v. New York, 394 U.S. 576 (1969), Justice Black's dissent attacked the balancing approach employed by Justice Harlan's majority opinion, though Justice Black would have sustained the conviction because he considered flag burning to be "conduct" rather than speech.

387. Griswold v. Connecticut, 381 U.S. 479, 515 (1965) (Black, J., dissenting). For discussion of the absolutes-versus-balancing controversy, *see, e.g.*, Kalven, *Upon Rereading Mr. Justice Black on The First Amendment,* 14 UCLA L. REV. 428 (1967) (finding the controversy "on the whole to have been an unfortunate, misleading, and unnecessary one").

388. Balancing is "the essence of the judicial process—the nexus between abstract law and concrete life. . . . Surely the choice is simply this: shall the balancing be done 'intuitively' or rationally; covertly or out in the open?" Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz,* 17 VAND. L. REV. 479, 481–82 (1964); *see also* M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 232 (1984) (discussing balancing in the context of first amendment overbreadth analysis) ("By denying the existence of interest-balancing . . . the Court was not avoiding use of a balancing process; rather, it was turning the process into an unstated, and therefore likely unthinking and less refined, balance.")

389. Bork, *supra* note 9, at 8 ("[T]he choice of 'fundamental values' by the Court cannot be justified."); *see also* J. Ely, *supra* note 6, at 43–72.

390. Bork, *supra* note 9, at 8 ("The judge must stick close to the [constitutional] text and history, and their fair implications, and not construct new rights.").

391. M. PERRY, *supra* note 1, at 6.

392. Bork, *supra* note 9, at 7.

with "a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional."[393] His analysis then can be reduced to a comparison between "forms of gratification"—sexual gratification versus economic gratification[394]—leading to his conclusion that no court can make a valid distinction between the two: "There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another."[395] Thus the only principled course is "to let the majority have its way in both cases."[396]

Bork's analysis is as incomplete as Douglas' in *Griswold* or Blackmun's in *Roe*. Bork never considers the differences between the government's interest in regulating smoke pollution and its interest in prohibiting the use of contraceptives. Even a passing glance at the public need for these two forms of regulation would reveal that the societal impact of smoke pollution is vastly greater than that of contraceptive use by married couples, but Bork's comparison of gratifications does not even include the "gratifications" asserted by the state, an essential ingredient in the constitutional balance.[397] Only the interests asserted *against* the state are weighed against each other, in the abstract, divorced from their social and legal contexts, so that Bork can easily find them indistinguishable.[398]

In the context of a decision regarding the constitutionality of a statute restricting individual liberty—and Bork concedes "there are some areas of

393. *Id.* at 9. Bork considers these two cases "identical." *Id.*

394. *Id.* at 10.

395. *Id.*

> The necessary implication of [Bork and Rehnquist's] moral skepticism is that there is no "principled" ground on which the Court *or indeed anyone else* can oppose duly enacted laws establishing segregation or abolishing freedom of expression or of religion. The value judgment that segregation is morally evil, or that freedom of expression or of religion is morally good, has no claim on us as a society (except and only to the extent that such judgments have been enacted into positive law). Indeed, according to moral skepticism, there is no "principled"—morally nonarbitrary—ground for objecting to laws authorizing torture, establishing slavery, or even instituting another Holocaust. . . . [The point is that] moral skepticism is a terribly difficult position to take seriously in this post-Holocaustal age. Moreover, it is, happily, a position not widely shared in the United States today, nor has it ever been.

M. PERRY, *supra* note 1, at 105 (footnotes omitted).

396. Bork, *supra* note 9, at 10.

397. Bork does identify the state interests that could be asserted. For pollution control, the "State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority's physical and aesthetic gratifications." *Id.* He might have added a concern for health. For the prohibition of contraceptives, the "state can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications." *Id.* at 9–10.

398. "No answer is what the wrong question begets." A. BICKEL, *supra* note 11, at 103.

life a majority should not control"[399]—the state's reason for the restriction is a crucial element. In prohibiting the deprivation of liberty without due process of law,

> the Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[400]

In the context of *Griswold,* it is the mere knowledge that someone out there is using contraceptives that constitutes the "evil."[401] Unless one can rationally conclude that such knowledge menaces the "morals . . . of the people," there is no sufficient justification for prohibiting use of contraceptives. Whether smoke pollution is an evil menacing the "health, safety . . . and welfare of the people" is, at the very least, a much closer question.[402] The distinction between the two cases lies, not solely in the fundamentalness of the values protected, but also in the seriousness of the evils addressed and the necessity for protecting society against them.

Even if one looks only at the values protected, there is much more involved here than Bork's "sexual gratification." Personal privacy and autonomy are more than the purely personal value choices of a wayward Court. They are an integral part of our constitutional design.[403] It is the critics of the constitutional right to privacy, not the Court, who have "lost touch with the moral vision underlying the constitutional design."[404] The formulation of the right of privacy may have begun with values derived by Warren and Brandeis from the common law, but with his *Olmstead* dissent,

399. Bork, *supra* note 9, at 3.

400. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

401. In a different context, Justice Rehnquist described the same kind of evil as "the psychological consequence presumably produced by observation of conduct with which one disagrees." Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485 (1982). Justice Rehnquist did not consider such an injury sufficient to confer standing, even when the conduct was actually observed (as using contraceptives is not) and was also alleged to be a violation of the religion clauses of the first amendment. *Id.*

402. And so, concededly, is abortion. Although, as with contraception, it is the mere knowledge that the activity is taking place that constitutes the "menace," the societal interest in preserving prenatal life adds considerable weight to the state's interest. The burden on the pregnant woman's liberty, however, is also much weightier.

403. *See* L. TRIBE, *supra* note 16, at § 15-3. "[T]he Constitution is not a totalitarian design, depending for its success upon the homogenization or depersonalization of humanity. The judiciary has thus reached into the Constitution's spirit and texture, and has elaborated from the spare text an idea of the 'human' and a concept of 'being' not merely contemplated but required." *Id.* at 893.

404. Richards, *supra* note 297, at 1017.

Brandeis found the connection between these common law values and similar values embedded in our Constitution and Bill of Rights. The original conception of a government of limited powers and rights retained by the people itself embodies Brandeis' concept of "inviolate personality."[405] The constitutional connection was further elaborated in Harlan's *Poe* dissent, and even in Douglas' penumbra opinion in *Griswold*. This process did not import values into the Constitution; it merely identified values that were already there.

The very abstractness of Bork's argument is oddly reminiscent of *Lochner,* indicating that his reasoning is infected with the same flaw that Brandeis identified in *Lochner*—reasoning from abstract conceptions rather than from life.[406] And since Bork's premises are accepted, at least arguendo, by the present proponents of majoritarianism, the same flaw permeates the debate on judicial review, giving rise to a new majoritarian difficulty. Some erstwhile noninterpretivists have conceded all to the strict interpretivists, allowing them to define the limits of judicial review, so that any review beyond the narrow limits of clause-bound interpretivism must be justified or conceded to be a raw assertion of political power.[407] Ely attempts a justification in terms of *Carolene Products* footnote four, and Perry in terms of prophecy, but such justifications are neither sufficient nor necessary. What is missing in the current discourse is any sense of the *purpose* of our constitutional scheme.[408] It is the old confusion of ends with means. Revolutions are not fought to secure majority rule, but for the promise of a better life that the democratic process holds out. Perhaps the two hundred years that have elapsed since our Revolution have dimmed the memory and obscured the values for which it was fought, and perhaps that

405. Warren & Brandeis, *supra* note 296, at 205.

406. L. BRANDEIS, *supra* note 326, at 320.

407. *See supra* notes 190–99 and accompanying text. "We have seen an extraordinary amount of talent deployed to reconcile judicial review and democracy." Dworkin, *supra* note 230, at 516.

Another commentator suggests that Perry "allows the challenge of skepticism to take hold, and attempts to defeat it on a *battleground it has chosen.*" O'Fallon, *Skepticism and Politics in the Domain of Rights,* 8 DAYTON L. REV. 713, 715 (1983) (emphasis added).

Sedler concludes that "the purported tension between representative democracy and noninterpretive review is illusory. As a result, the underlying assumption of the legitimacy debate is completely erroneous, and the framework within which the debate has proceeded is analytically unsound. Thus, the validity of the debate itself is most dubious." Sedler, *supra* note 16, at 97.

408. *See* Dworkin, *supra* note 230, at 472–73; *cf.* M. REDISH, *supra* note 388, at 19:

> The primary flaw in the [first amendment] analysis of Bork and Meiklejohn is that they never attempt to ascertain what basic value or values the democratic process was designed to serve. . . . [P]olitical democracy is merely a means to—or, in another sense, a logical outgrowth of—the much broader value of individual self-realization. The mistake of Bork and Meiklejohn, then, is that they have confused one means of obtaining the ultimate value with the value itself.

is why the vision of the immigrant, or of a first generation American like Brandeis, is sometimes much clearer.

The significance of rights of privacy and autonomy in the modern world should not be lost in the endless debates on abortion and judicial review. Privacy is more than just a vague concept; it is "the necessary, limiting condition of much or all that we value in our intimate lives."[409] Consequently, it is a right that "has flourished as a result of this nation's dedication to individual rights and the related concept of human dignity."[410] To see this right through the eyes of Brandeis is to see a fusion of the original revolutionary concept with the reality of its application to the complex facts of living in the present day.[411] This is a concept that no more threatens our form of constitutional democracy than does the Bill of Rights, which restricts the majority's power to curb individual rights.[412]

Judicial review "insures that the most fundamental issues of public morality will finally be set out and debated as issues of principle and not simply issues of political power."[413] Its "irreplaceable value . . . lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action."[414] If we abandon that practice now, in favor of a sterile jurisprudence based on pure majoritarianism, then we must say to Brandeis that we no longer value liberty as an end, but only as a means; that the final end of the state is not to make men and women free to develop their

409. Gerety, *supra* note 297, at 245.

410. Peck, *supra* note 17, at 898; *see also* Glennon, *supra* note 230, at 232–33 (arguing that the *Griswold* right of personal autonomy—Brandeis' "right to be let alone"—"might properly be regarded as fundamental—perhaps, indeed, the most fundamental of rights").

411. Recall Professor Freund's assessment that "with immense resourcefulness he found ways to build the ancient ideals we profess into the structure of twentieth-century America." P. FREUND, *supra* note 284, at 145; *see also* Dworkin, *supra* note 230, at 469: "We seem caught in a dilemma defined by the contradiction between democracy and ancient, fundamental, and uncertain law, each of which is central to our sense of our traditions . . . ."

412. *Cf.* Bennett, *supra* note 158, at 987 ("[D]istrust of majoritarian rule is a major theme of our political heritage," formally embodied in the Constitution itself.).

413. Dworkin, *supra* note 230, at 517; *cf.* M. PERRY, *supra* note 1, at 101 ("[T]he practice of noninterpretive review has evolved as a way of remedying what would otherwise be a serious defect in American Government—the absence of any policymaking institution that *regularly* deals with fundamental political-moral problems other than by mechanical reference to established moral conventions.").

414. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

In discussing Learned Hand's skepticism, Richards notes that

> Hand concedes strong substantive moral values of human rights were assumed by the great founding documents—the Declaration of Independence, the Constitution, the Bill of Rights. But, following Holmes, he argues that a sound jurisprudence (legal positivism) requires that law be cynically washed in acid to remove all such moral ideals. When we do so, given the substantive dependence of judicial review on such values, judicial review is left without content.

Richards, *supra* note 230, at 729 (footnotes omitted).

faculties, but only to make government more majoritarian; and that whether or not liberty is the secret of happiness is the kind of moral judgment that should be left to the majoritarian political processes.[415] This is too high a price to pay for a doomed attempt to limit the discretion of judges.

415. The paraphrase, of course, is of the Brandeis concurrence in *Whitney v. California:*

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty . . . .

274 U.S. 357, 375 (1927). The remainder of the quotation deals with liberty as a means, specifically, "freedom to think as you will and to speak as you think [as] means indispensable to the discovery and spread of political truth." *Id.* This justification for protection of first amendment rights fits into Ely's process-oriented approach, and represents, in fact, his preferred justification (that these rights are "critical to the functioning of an open and effective democratic process"). J. ELY, *supra* note 6, at 105.